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Supreme Court of the United States.

October Term, 1885.

No. 984.

THE STATE OF ALABAMA, JOHN SWANN AND JOHN A. BILLUPS, TRUSTEES AND ASSIGNEES, APPELLANTS,

vs.

T. G. MONTAGUE, *et al.*

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

BRIEF OF SAML F. RICE, FOR THE APPELLANTS.

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Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

BRIEF OF SAM'L F. RICE, FOR THE APPELLANTS.

This is a suit in equity (for the foreclosure of a mortgage) commenced in the Chancery Court of Hamilton county, Tennessee, on May 28, 1883 (Record p. 12), and afterwards removed to the Federal court. Its object, like that of the ejectment suit No. 335 on the docket of the United States Supreme Court, was to enforce the rights derived from the mortgage executed March 2d, 1870, by the Alabama & Chattanooga Railroad Company to the State of Alabama, set forth in the record (pages 19, 20), as to some 22 acres of land in Chattanooga in said county of Hamilton, particularly described in the bill in this suit, as well as in the ejectment suit. The said mortgage was duly registered in said county March 24th, 1870 (Record p. 55).

All parties claim from and under the Alabama & Chattanooga Railroad Company, and from and under the same title which that company derived from J. P. McMillin.

The origin of the claim of all the defendants, is the deed which they allege "the Alabama & Chattanooga Railroad Company, through John C. Stanton, its general superintendent and *professing* to be its attorney in fact," executed to Thomas Webster on February 25th, 1871, acopy of which, marked Exhibit A. is attached to the answer of the chief defendants (Record pp. 59, 62).

On April 8th, 1871, said Webster conveyed to the chief defendants, Montague, Tower *et al.*, from whom subsequently the other defendants obtained whatever claim they assert to the property in controversy.

The answer of the chief defendants admitted the following facts in the following language: "That on the 31st day of March, 1870, *after the execution of the mortgage*, one J. P. McMillin conveyed the land described in the original bill, by deed of that date, to the Alabama & Chattanooga Railroad Company; the vendee, on that date, paying therefor the sum of $6,000.00, or two-thirds of the purchase-money, *one-third having been paid March* 25th, 1869, as is recited in McMillin's deed."—Record, p. 59.

A duly certified copy of said deed of J. P. McMillin to the Alabama & Chattanooga Railroad Company, with the entries thereon, is set forth as part of the record and as an exhibit to the agreement and consent of the attorneys of the respective parties correcting mistakes and supplying omissions of the printed record, herewith submitted to the United States Supreme Court.

The said mortgage of March 2d, 1870, was executed in accordance with an act of the legislature of Alabama, approved February 11, 1870, set forth on pages 9 to 11 of the record, to secure the payment of the negotiable bonds of the Alabama & Chattanooga Railroad Company and the interest coupons thereto attached, each of which bonds were for $1,000.00, payable to bearer on the 2d day of December, 1899, with interest coupons attached, payable to bearer semi-annually at the rate of eight per cent. per annum; which bonds and coupons of the company were executed in

exchange for two millions of the bonds of Alabama, loaned at the time to said company under said act of February 11th, 1870. (Record pp. 12–20). The mortgage purports to convey to the State of Alabama and its assigns, "*forever*, all lands granted by the United States to and for the benefit of this company, * * * * * * * ; also the telegraph line and telegraph offices along the line of said road and *belonging to said company;* also the machine shops AND ALL OTHER PROPERTY in said States of Alabama, Georgia, Tennessee and Mississippi, *belonging to said company;* also, all coal mines now open, or hereafter to be opened and worked, *belonging to said company;* and all iron and other mineral lands, and all iron manufacturing establishments now in operation or hereafter to be constructed, saving and excepting *only from said granted premises* such and *so much* of the same as said company may have heretofore conveyed in mortgage in or by either or both of two indentures of mortgage, both made on December 19th, 1868, and covering the railroad and certain other property of said company; for a more specific description whereof reference is hereby made to said two indentures, the same having been recorded in the counties where said road is located."

There is no claim or pretense that the 22 acres of land here in controversy, or any part of the same, was embraced by said former mortgages or either of them. No such defense is alleged. The defenses set up are altogether different. The company did not even acquire any claim to these lands until March 25th, 1869,—long after said two mortgages of December 19th, 1868. And the court below repelled any idea that these lands were embraced in the mortgages of 1868, by distinctly placing its decree in favor of appellees, upon *the single ground*, that the *statute of limitations* of Tennessee (of seven years) was *a bar to any relief in this cause.*

The State of Alabama continuously owned the mortgage and mortgage debt from their origin in March, 1870, until February 8th, 1877,—a period of less than seven years. On

February 8th, 1877, the State, by its Governor, conveyed or assigned, under its Debt Settlement Act of February 23d, 1876 (Record, 22–40), to Swann & Billups, trustees under that act, various kinds of property, including said mortgage and mortgage debt. (Record, pp. 38–40.) This conveyance or assignment to Swann & Billups was *within less than seven years before the commencement of this cause.* No coupons falling due prior to June, 1876, are shown or claimed in this cause. The principal of the mortgage debt will not be due until December 2d, 1899. *The very first default* on the part of the mortgagor, which is alleged in the bill, consists of the non-payment of the coupons which matured in June 1876—which default occurred *within less than seven years before this cause was commenced.*

The defendants have not put enough in their answers to entitle them to the benefit of the statute of limitations. They show by their answers, that on March 25, 1869, the mortgagor, the A. & C. Railroad Company, bought the lands from McMillin, and then paid him one-third of the purchase-money, and afterwards, March 31st, 1870, paid him the other two-thirds of the purchase-money and received his conveyance of that date to the mortgagor. They also show that the mortgage was executed to the State of Alabama on March 2d, 1870, and was duly registered on March 24th, 1870, and that it was *nearly a year thereafter,* to-wit, February 25th, 1871, before the mortgagor executed the deed to Webster, which is the unquestionable origin of the claim of all the defendants. And yet, there is nothing in the answers of defendants or in the evidence, showing that the mortgagee, the State of Alabama, had any knowledge or notice for seven years, or for any other period, before the commencement of this suit, that any of the defendants held, or claimed to hold, adversely, or in hostility, to the mortgagee, or disclaimed, or disavowed or denied, the title of the mortgagee. On the contrary, defendants, Montague and others, in their answer on page 56 of the Record, state "that neither the MORTGAGEE, the State of Alabama, or any of its officers

or agents, had any knowledge of the existence of said piece or parcel of land, much less of *its ownership by the Alabama & Chattanooga Railroad Company* at the date of the execution of the mortgage, OR FOR SEVERAL YEARS THEREAFTER."

Even if the statute of limitations had been sufficiently pleaded, the evidence fails to prove either such possession, or such knowledge or notice thereof by the mortgagee or his assigns, as could bar all relief in this suit.

As the Honorable Circuit Judge presiding on the trial of this cause, decided it upon the statute of limitations only, it is deemed unnecessary to notice other matters which obviously the presiding judge very properly did not feel authorized to decide favorably to appellees.

Upon the final hearing of this cause, the said Circuit Court declared that it was of opinion "that the statute of limitations is a bar to the relief sought by complainants," and, "therefore," decreed that "the bill of complaint be dismissed out of this court, and that the complainants pay the costs to be taxed by the clerk of this court, for which an execution is awarded." (Record, p. 3.)

The complainants immediately prayed for and obtained in open court an appeal from said decree and perfected the appeal.

ASSIGNMENT OF ERRORS.

The appellants, by their attorney, say: that in the record and proceedings aforesaid, there is manifest error in the respects and particulars following, to-wit:

1. The said Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee, erred in its said final decree, set forth on page 3 of the record.

2. The said Circuit Court also erred in holding or ruling that the statute of limitations was a bar to the relief sought by complainants, and that, "therefore," the bill of complaint be dismissed out of that court.

3. The said Circuit Court erred in dismissing the bill of complaint out of that court.

4. The said Circuit Court erred in refusing any relief to complainants.

And the appellants pray that the decree aforesaid, of said Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee may be reversed, annulled, and altogether held for naught.

ARGUMENT FOR APPELLANTS.

The statutory provisions of Tennessee, (the *lex rei sitæ*), in relation to conveyances of every kind, were intended "to reduce the forms of conveyance to their simplest elements, and to give *the largest meaning to granting words*, unless limited by the instrument itself."—Daley v. Willis, 5 Lea (Tennessee) R. 104. Hence, the largest meaning must be given to "the granting words" contained in the mortgage of March 2, 1870. Pennock v. Coe, 23 Howard, 117.

Upon the admitted or established facts, that on March 25, 1869, the Alabama & Chattanooga Railroad Company purchased the lands here in controversy from J. P. McMillin, the then undisputed owner, and paid him one-third of the purchase-money and acquired control thereof; and that afterwards, on March 2, 1870, the company executed to the State of Alabama the mortgage of that date, embracing amongst other specified lands "all other property in said States of Alabama, Georgia, Tennessee and Mississippi, belonging to said company;" and that said mortgage was duly registered on March 24, 1870, in Hamilton county, Tennessee, in which county the lands in controversy are situated; and that afterwards and on March 31, 1870, said McMillin received from said company the other two-thirds of the purchase-money and executed a deed of conveyance of the lands here in controversy to said company,—the said conveyance of McMillin to said company, as against all persons who, like the defendants, acquired or derived their only claim to said last mentioned lands from or under the mortgagor, *by transac-*

tions entirely subsequent to the registration of the mortgage, converted the equitable title of the company "into a legal title, which, at once, by operation of law, inured to the benefit" of the mortgagee.—Skidmore v. Pittsburg, Cincinnati & St. Louis Railway Company, 112 U. S. Rep. 33; Bush v. Marshall, 6 Howard, 284, 291; Threadgill v. Pintard, 12 Howard, 24; Henshaw v. Wells, 9 Humph. (Tennessee) R. 568; Crook v. Lunsford, 2 Lea (Tenn.) R. 237; Bank of Greensboro v. Clapp, 76 North Carolina Rep. 482; Crane v. Turner, 7 Hun. (N. Y.) R. 357; Van Ransseler v. Kearney, 11 Howard, 323. Doe v. Larmore, October term 1885, of this court.

The recital of the execution of the bond for title in the deed of McMillin to the Alabama and Chattanooga Railroad Company, is sufficient evidence of the execution of that bond, as against the defendants in this cause. Carver v. Astor, 4 Peters, 1; Crane v. Morris, 6 Peters, 598.

The parting with, or loan of money, or its equivalent, upon the faith of the mortgage, is, *pro tanto*, a sale, and gives such a mortgagee, to the extent of the loan, all the rights of a bona fide purchaser for value without notice. Chadwell v. Wheless, 6 Lea, (Tenn.) R. 322; Carpenter v. Longan, 16 Wallace, 271.

The objection, that the mortgage does not convey the lands here in controversy, *by specific designation and description*, is clearly insufficient, both upon reason and authority. McGavock v. Deery, 1 Caldwell, (Tenn.) R. 265; Seifreid v. People's Bank, 2 Tennessee Chancery Rep. (by Cooper), 17; Sheets v. Selden's Lessee, 2 Wallace, 177; Wilson v. Boyce, 92 U. S., R. 320; Spindle v. Shreve, 111 U. S., R. 542; Frey v. Clifford, 44 Cal., 343; Lessee of Barton v. the Heirs of Morris, 15 Ohio, 408; Hoxie v. Lawrence, 117 Mass., 111; St. Louis *etc* Railway Co. v. McGee, 115 U. S., R. 476, citing approvingly, Wilson v. Boyce, 92 U. S., R. 320.

The exception made in the mortgage, is conclusive, that the mortgagor intended to convey, and did convey all its

property, *save only* "such and so much of the same," as it had not theretofore conveyed by its two mortgages of 1868, referred to as duly recorded. As the mortgagor's claim to the lands here in controversy was not acquired until March 25, 1869, long after the making of said mortgages of 1868, and as the defendants virtually concede, that these two mortgages did not embrace the 22 acres here in controversy; it is clear and certain, that these 22 acres are embraced by the mortgage to the State of Alabama, the enforcement of which is sought by this suit. Gardner v. Morrison, 12 Ala. R. 547; Pierce v. The Milwaukee & St. Paul R. R. Co., 1 Am. Rep. 203.

No one of the defendants ever had, or pretended to have, any claim to the land here in controversy, except such as was founded upon, or derived from the deed of the mortgagor to Thomas Webster, executed February 25, 1871, nearly a year after the registration of the mortgage to the State of Alabama, and nearly six years before the State, by its Governor, had made any assignment of the mortgage or mortgage debt to Swann & Billups. As against the mortgagee, no one of the defendants can be treated as a bona fide purchaser of anything more than the mere equity of redemption of the mortgagor. The purchase of the equity of redemption, after the due registration of the mortgage, put the purchaser in the position of the mortgagor; and possession by that purchaser was not adverse to the mortgagee. 2 Jones on Mortgages, sections 1202, 1204; Wright v. Evans, 5 Richardson's Equity, (So. Ca.) R. 81; Hughes v. Edwards, 9 Wheaton, 489; Hammond v Hopkins, 3 Yerger, 525; Norris v. Ellis, 7 Humph. (Tenn.) R. 463; Smith v. Woolfolk, 115 U. S., R. 143.

In Tennessee, the possession of a mortgagor, or of one purchasing from him, after due registration of the mortgage, if under twenty years, cannot possibly bar foreclosure, unless upon satisfactory proof, not only of an adverse possession of seven years, "*but in addition*," that the mort-

gagee or his assignee had "full *knowledge*" *thereof*, "*during all that period of time*", that is, for the period of at least seven years before the institution of the suit for foreclosure. Elliot v. Elliot, 3 Head, (Tenn) R. 700; Yarbrough v. Newell, 10 Yerger, (Tenn.) 382; Duke v. Harper, 6 Yerger, 286, 287, Adams 56, 14, Vin., Ab. 512. Smith v. Woolfolk, 115 U. S., R. 143.

The principle is, that to change the relation of the parties, there must be *actual personal knowledge* that the possessor is holding adversely and for himself, "during the whole period of seven years." "*Constructive* notice is not sufficient." See cases last above cited, and 1 Meig's Digest, 2d Edition (by Milliken), top page, 568, section 11; 3 Meig's Digest, 2d Edition (by Milliken), top page, 1844, section 1895.

The reason is, because the privy not in possession "must have *neglected to sue* for seven years. Before knowledge, he could not be guilty of neglect (or acquiescence). As to him, *positive and undoubted knowledge* is the date of the ouster, or rather the evidence from which it may be inferred. The privity of the parties being *mutual*, so must be its severance." Duke v. Harper, 6 Yerger, 287; 4 Howard, 295, 296; 9 Wheaton 288, 67 Ala. R. 228.

The lien acquired by the mortgage for the security of the debt, is only enforceable in equity. And although the action at law for the recovery of the mortgaged property, or of the mortgage debt, may be barred by the statute of limitations, the remedy in equity is open for at least twenty years, and the right to foreclose, at any time before the expiration of twenty years may be enforced. The statute of limitations does not apply to *the equity* of either a mortgagor or mortgagee. See authorities above cited.

As between privies, such as mortgagor and mortgagee, or others standing to each other in *like relations*, the presump-

tion is against an adverse possession; and every presumption is in favor of a possession in subordination to or in accordance with the title of the true owner. Adverse possession must be made out "by clear and positive proof, and not by inference." Heirs of Marr v. Gilliam, 1 Coldwell, (Tenn.) R. 500; Hubbard v. Wood, 1 Sneed (Tenn.) R. 286.

The rights of the mortgagee or of his assignee, cannot be prejudicially affected by the dealings of the mortgagor with third persons, in which he had no participation and of which he had no knowledge or notice. Bronson v. La Crosse, R. R. Co., 2 Wallace, 305.

The holder of such a mortgage as that here sought to be enforced and of such bonds as are secured thereby, has *the option* to treat the interest, evidenced by the coupons attached to each bond, as "a mere incident of the debt," and "to insist upon its payment when due, or to allow it to run until the maturity of the bond;" that is, until *the principal* becomes payable. Until the *principal* matures, the coupons, though overdue, do not lose the quality of negotiability, but continue as mere *incidents* to be controlled by *the principal*. Cromwell v. county of Sac, 96 U. S. R. 58; Thompson v. Perrine, 106 U. S. R. 589, 592; Morgan v. The United States, 113 U. S. R. 476; Carpenter v. Longan, 16 Wallace, 271; Kenicott v. The Supervisors, 16 Wallace, 452.

The law will not compel a debtor to pay, nor a creditor to receive, debts before they are due. And when instalments of interest become due before the principal has become due, and the interest as well as principal is secured by a mortgage on the same property, the law gives to the creditor the option to allow the over-due interest to run until the maturity of the principal. By compelling the creditor to foreclose as to the interest, before he can foreclose as to the principal, the creditor would often be subjected to injustice and loss in consequence of the settled doctrine, that a sale of the mortgaged premises in pursuance

of a decree of foreclosure, passes to the purchaser at such sale all the title and interest of both mortgagor and mortgagee, and of other parties to the suit, in and to the property sold. Poweshick county v. Dennison, 36 Iowa, 248; Chicago. etc., R. R. Co., v. Fosdick, 106 U. S. R., 47; Howell v. Western Railroad, 94 U. S. R., 463.

It is a maxim of the common law, that "no right can be barred before it accrues." Blackman v. Blackman, 16 Ala. R. 636.

But the decree of said Circuit Court in this cause virtually is, that the right to enforce the said mortgage of March 2d, 1870, either as to *the principal or interest* of the mortgage debt, by bill in equity, was barred by the Tennessee statute of limitations of seven years, *more than fourteen years before* any part of *the principal* had become due. The decree goes further, and practically adjudges that the aforesaid remarkable bar, was effected by the acts and conduct of the mortgagor with third persons *subsequent to the registration of the mortgage*, without any participation or knowledge of such acts and conduct on the part of the mortgagee or his assignees. Bronson v. La Crosse R. R. Co., 2 Wallace, 305.

The decree in this case goes yet beyond all this; and virtually abolishes, without due process of law, the aforementioned valuable OPTION of every such mortgagee or his assignees, to treat *the interest* as the mere incident, and to allow it to run until the maturity of *the principal.*

The same decree, as if to intensify its extravagance, wholly disregards the fact, that the first default in the payment of even *interest*, which is established in any authorized mode, occurred *within less than seven years* before the commencement of the suit, and consisted of the non-payment of the coupons falling due in June, 1876; and equally disregards the fact, that the mortgagee (Alabama) is a State of the Union; and the additional fact, that it was within less than seven years before the commencement of this suit, when the

bama, by its Governor, transferred the mortgage
ge debt and all its rights thereunder, to the trus-
and Billups.

n v. Purcell, 2 Head. (Tenn.) R., and Ray v.
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l of the mortgage debt must have become due,
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aw of Tennessee, the "*lex rei sitæ*," to nullify the
the highest Federal Court, and THE OPTION
ded to belong to such a mortgagee and its
disclosed in this cause, and to make the *prin-*
able by its *mere incident, the interest*, instead of
mere incident to be controlled by *its principal*.

is; to sustain the decree in this cause, will be
the statute of limitations of Tennessee is as ap-
sister State (Alabama) as to a resident citizen
e!—Gibson v. Chouteau, 13 Wallace, 92, 99;
Miller, 6 Peters, 666, 669; Steele v. United
J. S. 134, 135; United States v. Hoar, 2 Mason's
le v. Gilbert, 18 Johns. 228. Angell on Limitations,
8 & notes; Wood on Limitations, p. p. 88-94.

when the State of Alabama is the mortgagee of
d in Tennessee, notice to it, that the mortgagor
who purchased from the mortgagor subsequent
ation of the mortgage, have disclaimed holding
mity with the mortgagee, can not be presumed,
e satisfactorily proved. And there can be no
proof to that effect in this cause, in view of the
mission in defendant's answer, on page 56 of
hat neither the mortgagee, the State of Ala-
of its officers or agents, had any knowledge of
of said piece or parcel of land, much less of
by the Alabama and Chattanooga Railroad

Company, at the date of the execution of the mortgage, *or for several years thereafter.*"—Smith v. Woolfolk, 115 U. S. R. 143.

SAM'L F. RICE,
Attorney for the Appellants.

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No. 335.

THE STATE OF ALABAMA, JOHN SWANN AND JOHN A. BILLUPS, TRUSTEES AS WELL AS GRANTEES, PLAINTIFFS IN ERROR,

vs.

THEODORE G. MONTAGUE IN HIS OWN RIGHT AND AS AGENT OF XENOPHON WHEELER, GEORGE M. SHERWOOD, ISAAC H. TOWER, *et al.*

In Error to the Circuit Court of the United States for the Eastern District of Tennessee.

BRIEF OF SAML F. RICE, FOR PLAINTIFFS IN ERROR.

described in the Declaration in this suit, as well as in the bill in the Foreclosure suit. The said mortgage was registered in said county.—(Record p. 26).

The defendants disclaimed as to several parts of the premises described in the declaration, and pleaded not guilty "as to the remainder of the premises."—(Record pp. 9 to 12).

All parties claim from and under said Railroad Company, and from and under the same title which that company derived from John R. McMillin.

The deed of conveyance of said McMillin, to said Railroad Company, executed March 31st, 1870, is set forth in the record, page 22. But that deed, by its recitals and statements, shows that it was executed "IN COMPLIANCE WITH A TITLE BOND GIVEN, DATED MARCH 25, 1869," and that "three thousand" dollars of the purchase money had been theretofore paid, and that the other "six thousand" of the entire price ($9,000), was paid at or before the execution of the deed.

The right of the plaintiffs dates back to March 25, 1869, *the time when the title bond was executed by McMillin to the railroad company*, and one-third of the purchase money was paid to him, and the company took control of the land here in dispute.—Record, p. 32.

The right of the defendants cannot date further back than February 25, 1871, the time when John C. Stanton, styling himself "attorney in fact and general superintendent of the Alabama and Chattanooga Railroad company," executed to Thomas Webster the conveyance of that date, which is set forth on pages 27 and 28 of the record. From that conveyance to Webster, the only claim which any of the defendants allege or pretend to any part of the premises here sued for originated. It is only through that conveyance of the mortgagor company to Webster, that any of the defendants claim from McMillin. It is through said *title bond* of prior execution and date, that the claim of plaintiffs is derived from McMillin; and was consummated

and perfected by said deed of McMillin to the mortgagor company in March, 1870, *nearly a year before Webster or any defendant had even the color of a claim* to the premises here sued for. – (Record, p. 32).

The evidence introduced on the trial, in support of plaintiffs' right to a recovery, consisted of said *title bond* of McMillin of March 25th, 1869, payment of one-third of the purchase-money to him at that time, *compliance with that bond* by the company's control of the land under it, the deed of McMillin to the Alabama and Chattanooga Railroad Company of March 31st, 1870, the payment at that time of the remaining two-thirds of the purchase-money, the said registered mortgage of said company to the State of Alabama of March 2nd, 1870, and the advance or loan at the execution of the mortgage, of two millions of dollars of the bonds of Alabama to said company, in consideration of which the company at the same time executed its negotiable bonds for like amount, with interest coupons payable semi-annually secured by said mortgage, default in the payment of some of the interest coupons, deed of the State of Alabama by its Governor of February 8th, 1877, purporting to convey to Swann and Billus as trustees, among other things, the said mortgage and mortgage debt and all the rights of the State relating thereto, the statutes of Alabama authorizing said loan and mortgage, and also authorizing said deed to Swann and Billups. And it was "admitted by all parties to this suit, that the Alabama and Chattanooga Railroad Company never conveyed or parted with, or attempted to convey or part with, the property sued for in this action, or any right to any part of it, at any time before it executed its mortgage to the State of Alabama, dated March 2nd, 1870, and herein above mentioned." (Record, p. 16).

There was also evidence, tending to show *actual* notice of said mortgage, to the defendants through their attorney, who stated that "he presumed he saw the said mortgage when he looked up the title for the purchasers." (Record, p. 32.)

"For the purpose of showing that the defendants were all estopped from insisting on or making available to them in this suit, of any thing in the nature or quality of the title of said mortgagor, the Alabama and Chattanooga Railroad Company, after the execution of said mortgage, or defect in the title of said mortgagor of any kind, the plaintiffs read and introduced as evidence" the said deed of said John C. Stanton, attorney in fact of said mortgagor, to said Webster, the written instrument of the mortgagor ratifying said deed of said John C. Stanton, its attorney in fact, and other evidence, proving conclusively, that the only claim which any of the defendants ever had or made originated in and from said deed to Webster of February 25th, 1871. (Record, p. 27 to 37.)

The bill of exceptions sets out all the proof and the charge asked by plaintiffs and refused by the said circuit court, and the charge given by that court; and also shows the several exceptions, duly taken by plaintiffs, to the rulings of that court.

"The plaintiffs asked the court to instruct the jury that if it appeared from the proof that the mortgagor, The Alabama and Chattanooga Railroad Company, had an equitable title to the premises in dispute at the date of its mortgage to the State of Alabama and afterwards acquired the legal title, before it sold to Thomas Webster, and if the mortgagor had made default upon the payments of interest due upon its bonds for the security of which the mortgage was executed, this would authorize the plaintiffs to sustain an action of ejectment, and they would find for the plaintiff upon this point."

The circuit court refused to give this charge; the plaintiffs duly excepted, and the court then charged the jury as follows, (Record, p. 37–38):

"In an action of ejectment the plaintiffs must recover upon the strength of *his* title. In this court in this action the plaintiffs must show they had a valid legal title to the premises sued for, or some part of the premises, or that one

or more of the plaintiffs had such title. The plaintiffs claim under a title from McMillin; McMillin bargained the lands, as appears from the recitation of his deed, on the 25th of March, 1869, and executed his bond for title to the Alabama and Chattanooga Railroad Company.

"The plaintiffs have read a mortgage deed of said railroad company, executed to the State of Alabama, dated March 2nd, 1870, which they insist embraces this land, and they have read a deed from McMillin to said railroad company which by its terms conveyed the legal title of the premises to the company on the 31st of March, 1870, and after the date of the mortgage deed; and the plaintiffs have read a deed from the Governor of Alabama conveying to Billups and Swann, two of the plaintiffs, such title as the State of Alabama had acquired by virtue of the mortgage deed to the property mentioned therein; and these form their claim of title. Upon their own testimony they have no more than an equitable title to the premises sued for.

"And I therefore direct you to return a verdict in favor of the defendants.

"Plaintiffs' counsel insist the act of 1872, R. S., § 914, has so changed the law that if a recovery could be had under plaintiffs' title in this State in a State court that there must also be a recovery here, and they insist that they would be entitled to recover in a State court. I do not concur in this view of the matter. I do not believe that this act has changed in anywise the equity jurisdiction of the court of the United States.

"This view of the cause renders it unnecessary for me to charge you in regard to the other questions which have been so ably argued by the attorneys for the plaintiffs."

The plaintiffs duly excepted to this charge, as well as to each paragraph, as well as to each divisible part thereof; and "the court dispensed with any statement by plaintiffs, of the grounds, causes, or reasons for any of said several exceptions to said charge, and therefore plaintiffs did not state those grounds, causes and reasons."

Assignment of Errors.

The plaintiffs in error, by their attorney, say that in the record and proceedings aforesaid, there is manifest error in the respects and particulars following, to-wit:

1. The said Circuit Court of the United States, for the Southern Division of the Eastern District of Tennessee, erred in refusing to give the charge asked by them and set forth on page 37 of the printed record.

2. The said circuit court erred in charging the jury, that "in this action the plaintiffs must show they had a valid legal title to the premises sued for, or some part of the premises, or that one or more of the plaintiffs had such title."

3. The said circuit court erred in charging the jury, that the plaintiffs upon their own testimony, can have no more than an equitable title to the premises sued for.

4. The said circuit court erred in directing the jury "to return a verdict in favor of the defendants."

5. The said circuit court erred in directing the jury to return a verdict in favor of the defendants, without leaving to the jury the determination of actual or constructive notice to the defendants of the mortgage to the State of Alabama introduced in evidence, or the determination of any question whatever.

And the plaintiffs in error pray that the judgment aforesaid of said circuit court, may be reversed, annulled, and altogether held for naught.

Argument for Plaintiffs in Error.

An action of ejectment is a possessory remedy; and when the plaintiff recovers, the point decided is, "that he has a better title *to the possession* than either, or all of the defendants."—Chapman v. Armistead, 4 Munford's Rep. 397. "A judgment in ejectment is a recovery of *the possession*, without prejudice to the right, however it may appear afterwards, even between the parties."—Atkyns v. Horde, 1 Burrow's

R. 113–114; Smith v. Gayle, 58 Ala. R. 604; Tyler on Ejectment, 36.

By the statutes of Tennessee, "any person having a valid subsisting legal interest in real property, and a right to the immediate possession thereof, may recover the same in an action of ejectment; and "the declaration may contain several counts, and several parties may be named as plaintiff jointly in one court, and separately in others," &c.—2 Statutes of Tennessee, by Thompson & Steger, sections 3229, 3236, 3242, *et seq.*

By said section 3242, it is provided, that "upon the trial, the plaintiff need not prove an actual entry on or possession of the premises demanded, or receipt of any profits thereof, nor any lease, entry, or ouster, except as herein provided; *but it is sufficient for him to show a right to the possession of the premises at the commencement of the suit.*"

In direct defiance of this statute law, the circuit court charged the jury, in substance, that a right to the possession of the premises at the commencement of the suit, was not sufficient; but that the plaintiffs must show, that they or one or more of them, had a valid legal title to the premises sued for, or some part thereof.

A mortgage for a valuable consideration passing at the time, is *pro tanto* a sale; and gives the mortgagee to the extent of the money or its equivalent, advanced at the time, all the rights of a *bona fide* purchaser.—Bass v. Wheless, 2 Tenn. Chan. Rep. 531; 1 Meigs' Digest, second edition, by Milliken, pp. 567, 555; Chadwell v. Wheless, 6 Lea (Tenn.) R. 322; Carpenter v. Logan, 16 Wallace, 271.

The right of such mortgagee to the immediate possession of the mortgaged property, is clear,—especially after any default in the payment of interest or principal. And the right of such mortgagee, after any default, to maintain ejectment, exists at common law, and in the States of the Union, except where changed by statute.—Thomas on Mortgages, 397; Jackson *ex dem.* Ireland v. Hall, 10 Johns. R. 481; Doe *ex dem.* Duval's Heirs v. McLoskey, 1 Ala. R. 708.

The right of such mortgagee (or his assignee) to maintain ejectment, would not be lost or defeated by the concession, that at the execution of the mortgage, the mortgagor had only a title bond and control of the land, (Record, p. 32), and had paid only one-third of the purchase-money.—Crane v. Turner, 7 Hun, (N. Y.) 367; especially when the vendor of the mortgagor, within less than thirty days after the mortgage, received the remaining two-thirds of the purchase-money and "in COMPLIANCE WITH A TITLE BOND" *given before the mortgage*, executed a deed conveying the mortgaged property to the mortgagor. Such conveyance, "*in compliance with*" *such title bond, enured to the benefit of the mortgagee* and made the title of the mortgagee legal and perfect, as against the defendants, who did not acquire any claim until long afterwards; especially under the Tennessee statute system of conveyances, which was intended "to *give the largest meaning to granting words*, unless limited by the instrument itself."—Daley v. Willis, 5 Lea (Tenn.) R. 104; Pennock v. Coe, 23 Howard, 117; Skidmore v. Pittsburg, Cin. & St. L. Railway Co., 112 U. S. R. 33; Doe v. Larmore, October Term, 1885, of this court, by the Chief Justice; Bush v. Marshall, 6 Howard, 284, 291; Threadgill v. Pintard, 12 Howard, 24; Henshaw v. Wells, 9 Humph. (Tenn.) R. 568; Crook v. Lunford, 2 Lea (Tenn.) R. 237; Bank of Greensboro v. Clapp, 76 North Carolina R. 482; Irvine v. Irvine, 9 Wallace, 625; Stott v. Rutherford, 92 U. S. R. 107.

The objection of defendants, that the mortgage does not convey the lands here in controversy, *by specific designation and description*, is clearly insufficient and unavailing both upon reason and authority.—McGavock v. Deery, 1 Coldwell (Tenn.) R. 265; Seifreid v. People's Bank, 2 Tennessee Chancery Rep. (by Cooper), 17; Sheets v. Selden's Lessee, 2 Wallace, 177; Wilson v. Boyce, 92 U. S. R. 320; Spindle v. Shreve, 111 U. S. R. 542; St. Louis, etc. Railway Co. v. McGee, 115 U. S. R. 476, citing approvingly Wilson v. Boyce, 95 U. S. R. 320; Frey v. Clifford, 44 Cal. R. 343; Lessee of Barton v. Heirs of Morris, 15 Ohio, 408; Hoxie v. Lawrence, 117 Mass. 111.

The exception made in the mortgage is conclusive to show, that the mortgagor intended to convey and did convey all its property, save only "such and so much of the same" as it had not therefore conveyed by its two mortgages of 1868, therein referred to as duly recorded. It is admitted (Record p. 16) by all parties, that no part of the lands here sued for was ever parted with or conveyed by the mortgagor, "before it executed its mortgage to the State of Alabama, dated March 2, 1870". And it was also proved, that the land agent of said mortgagor company "had control of the land in dispute and looked after it, after the purchase from McMillin in March, 1869". Record p. 32. From March 1869, the mortgagor really owned and had control of the land in dispute under the title bond of McMillin, executed in that month, subject to the vendor's lien for the unpaid balance of purchase money; and by the deed of McMillin of March, 1870, executed "*in compliance with the title bond*," the title of the mortgagee and mortgagor was perfected as a legal title. Pierce v. the Milwaukee & St. Paul R. R. Co., 1 American R. 203.

Yet upon the evidence showing plaintiff's right to recover, the said circuit court left no question to the jury, deprived the plaintiffs wholly of a trial by the jury, and directed the jury "to return a verdict in favor of the defendants".

The reason assigned by that court for that erroneous direction, was, that the plaintiffs, "upon their own testimony, *can have no more than an equitable title to the premises sued for*".

In every point of view, the charge of the court below is erroneous. It virtually sacrificed the right of the plaintiffs under the registered mortgage, and the deed of McMillin, for the benefit of defendants, who never had a claim to the mortgaged property until nearly a year after the execution of the registered mortgage, and of the deed of McMillin, and until after actual notice to them by their attorney, of the existence of the mortgage, (as the evidence tended to

show.) Clearly, the court below by its charge, treated the plaintiffs as destitute of any right to recovery *on the single ground*, that their own testimony showed "no more than *an equitable title* to the premises sued for"; and, therefore, the court below excluded from the jury, the question of actual or constructive notice of the registered mortgage, and all other questions, and directed unconditionally a verdict in favor of the defendants.

The court below disregarded the settled principle, that, "on a title *by estoppel*, an action of ejectment may be maintained". Stoddard et al. v. Chambers, 2 Howard, 317; Irvine v. Irvine, 9 Wallace, 625.

In support of the foregoing views, see brief of appellants in No. 984, on the docket of this court, which is a foreclosure suit between these same parties.

SAMUEL F. RICE,
Attorney for Plaintiffs in Error.

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MAR 31 1886
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CLERK.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 335.

THE STATE OF ALABAMA, JOHN SWANN, AND JOHN A. BILLUPS, TRUSTEES,
Plaintiffs in Error,

vs.

THEODORE G. MONTAGUE, *et al.*

No. 984.

THE STATE OF ALABAMA, JOHN SWANN, AND JOHN A. BILLUPS, TRUSTEES,
Appellants,

vs.

T. G. MONTAGUE, *et al.*

Motion is made to advance, as well as to submit for decision, the two above entitled causes, upon the printed briefs of the attorneys of the respective parties, the printed record as corrected by agreement of said attorneys on file, and the agreement of the attorneys on file for trial of the cases on their merits.

On March 2d, 1870, the Alabama & Chattanooga Railroad Company executed its mortgage to the State of Ala-

bama to secure an indebtedness arising from a loan at that time to that company of two millions of dollars of the negotiable bonds of the State The *principal* of said mortgage indebtedness was payable in 1899, was evidenced by the negotiable bonds of the company with interest coupons attached, at the rate of eight per cent. per annum, payable semi-annually. The mortgage embraced all the property belonging to the company in Alabama, Tennessee, Georgia and Mississippi, except only so much thereof as had been conveyed by two mortgages executed to other persons by same company in 1868, and recorded in the counties through which the railroad of the company passed. The property in controversy in these two suits was real estate situated in Hamilton County, Tennessee, in which county the mortgage to the State was registered.

The object of each of the above entitled suits, was to enforce the rights and liens which the State of Alabama acquired as to said property in said County of Hamilton, by said registered mortgage of March 2, 1870. To each of said suits, the State of Alabama, as well as its assignees of said mortgage and of all its rights thereunder, were parties.

Suit numbered 335, was ejectment, according to the Statutes of Tennessee, to recover the property in Hamilton County; and was defeated by the decision of the United States Judge presiding on its trial, to the effect. that the title of the plaintiffs shown in the evidence was a mere *equitable* title, and that therefore, the verdict must be for defendants.

Suit numbered 984, was a bill in equity in the same United States Court, to foreclose the same mortgage to the State of Alabama, and to sell said property in Hamilton County to satisfy said mortgage indebtedness; and was defeated by the decision of the United States Judge presiding on its hearing, to the effect, that all relief in that suit was barred

by the Statute of Limitations, (of seven years), and his consequent dismissal of the bill.

The attorneys of the respective parties had the right to presume, that the record sent to this Court by the Clerk of the Court in which these causes were tried, was correct and free from any material omission or mistake. They acted upon that presumption in causing that record to be printed under the direction of the Clerk of this Supreme Court, and in making their first agreement to submit these causes for decision on their merits, before the middle of last December. Acting upon that presumption, they continued to be ignorant of the material omissions and mistakes which are corrected by their agreement of February 8th, 1886, until more than sixty days of the present term of this Court had expired; and after having discovered the said omissions and mistakes, they were unable upon repeated efforts, to agree upon the correction of some of the most material of them, until February 8, 1886, and after the expiration of ninety days from the commencement of the present term of this Court.

The corrections agreed on by said attorneys, on said February 8, 1886, are on file and are printed, and are indicated on the printed record so as to cause that printed record to conform to said agreement of said attorneys of February 8, 1886.

Without the corrections thus agreed on and made, there could not have been a trial upon the merits, in this Court, in the suit numbered 984. And obviously that suit and the suit numbered 335, ought to be tried at the same time.

All the parties are anxious for an authoritative decision of both these suits upon their merits, before the 1st day of May, 1886, the day on which the trust hereinafter noticed will expire.

The assignment by the State of the mortgage and all the rights thereunder was made February 8, 1877, in accord-

ance with the act of the Legislature of Alabama, approved February 23, 1876, commonly called the Debt Settlement Act; which is set forth in the record, and also Pamphlet Acts of Alabama of 1875–'76, pages 130 *et seq.* By that act, (and specially by sections 15 to 19 thereof), a trust was created to be closed upon the expiration of *ten years* from May 1st, 1876; and under that act Swann and Billups became trustees, and the *cestuis que trust*, were the State to the extent of the ten per cent. hereinafter mentioned, and *so many of the holders* of any of said bonds of the State which had been loaned as aforesaid, who might surrender the same to the State or its Governor *within said ten years*. By section 19 of said last mentioned act, the State reserved ten per cent. of the net proceeds of the sale by the trustees of certain lands embraced by the mortgage, to reimburse the State for certain interest paid by it.

By the adverse holding of the property here in controversy by the defendants, at and ever since the commencement of this suit, the trustees have been prevented from selling it, and will be prevented, at the expiration of the ten years fixed for the duration of the trust, from conveying it to the *cestuis que trust*, although they are required so to do by the 19th section of said act of February 23d, 1876. Hence, it is clear, that an authoritative decision of the pending cases, before May 1st, 1886, is essential to prevent injury to the several *cestuis que trust*. Until these cases shall be decided authoritatively, the trustees will remain unable to exercise functions required of them by the last mentioned statute, or to complete or close their said trust; and the *cestuis xue trust*, without any fault on their part, will be exposed to great, if not irreparable injury.

The defendants, if defeated in their defence, will not only lose the mortgaged property, but also the State and county and city taxes thereon, which they must pay whilst they hold and claim the property. An early decision of these

cases against the defendants will deliver them from future payments of such taxes.

As indicated in the recent letter of Mr. Wheeler directed to Mr. Justice MATTHEWS, and now in the control of this Court, these causes would have been submitted within the time mentioned in Rule 20, but for the number and materiality of the omissions and mistakes in the record shown in and corrected by said agreement of February 8th, 1886, the ignorance of said attorneys of said omissions and mistakes herein above mentioned, and the inability of said attorneys, upon repeated efforts, to agree upon the correction of said omissions and mistakes until they made their said agreement of February 8, 1886.

The granting of this motion, under these peculiar circumstances, cannot justly be regarded as a bad precedent, but will prove that this Court so administers its own rules as to avoid irreparable injury and secure speedy justice.

Respectfully submitted,

SAM'L F. RICE,

Attorney for Appellants and Plaintiffs in Error.

March 31st, 1886.

117-602 & 611

Office Supreme Court U. S.
FILED
MAR 4 1886
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES,

October Term, 1885.

No. 335.

The State of Alabama, John Swann, and John A. Billups, Trustees as well as Grantee, Plaintiffs in error,

vs.

Theodore G. Montague, in his own right and as Agent of Xenophon Wheeler, George M. Sherwood. Isaac H. Tower, et als.

Brief of Xenophon Wheeler,

Of Counsel for Defendants in Error.

CRANDALL & MORRISON, Printers and Binders, Chattanooga.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1885.

No. 335.

THE STATE OF ALABAMA, JOHN SWANN AND JOHN A. BILLUPS, TRUSTEES AS WELL AS GRANTEES, PLAINTIFFS IN ERROR.

vs.

THEODORE G. MONTAGUE, IN HIS OWN RIGHT AND AS AGENT OF XENOPHON WHEELER, GEORGE M. SHERWOOD, ISAAC H. TOWER *et al.*, DEFENDANTS IN ERROR.

STATEMENT OF THE CASE.

First. On the 2d of March, 1870, the Alabama & Chattanooga R. R. Co. executed a mortgage to the State of Alabama, to secure to that State the payment of two millions of bonds of that Company, deposited in exchange for an equal amount of the straight bonds of the state, delivered to the Company, bearing the same rate of interest, which straight bonds were to be sold and the proceeds of sale applied to the construction of the Alabama & Chattanooga Railroad. This was done in accordance with an Act of the General Assembly of Alabama, approved Feb'y 11, 1870, and the mortgage covered the lands granted the Company by the United States "to and for the benefit of the Company, and all the right, title, interest and estate which said Company now has or may hereafter lawfully acquire in or to said

lands." The mortgage also covered "the telegraph line and telegraph offices along the line of said road and belonging to said Company; also the Machine shops and all other property in the States of Alabama, Georgia, Tennessee and Mississippi, belonging to said Company; also all coal mines now open or hereafter to be opened and worked by said Company, and all iron or other mineral lands, and all iron manufacturing establishments now in operation or hereafter to be constructed." (Record p. 21).

There are no covenants for title in the mortgage. It is simply a quit-claim. The record fails to show when this mortgage was registered, if it was ever registered at all.

Second. Subsequent to the execution of the mortgage, on the 31st of March, 1870, John P. McMillin executed to the Alabama & Chattanooga R. R. Co. a deed to the land described in the declaration, containing the following recital: "For and in consideration of nine thousand dollars, three thousand heretofore, and six thousand this day to me in hand paid, the receipt of which is hereby acknowledged, and in compliance with a title bond given, dated 25th day of March, 1869, I hereby transfer and convey unto the Alabama & Chattanooga Railroad Company a certain piece or parcel of land," describing the land in question. (Record p. 22.)

The only proof that McMillin executed such a bond, or, if executed, that it was to the Alabama & Chattanooga R. R. Co., is contained in the above recital, as the bond was never registered, has never been produced, and McMillin died before the trial and his deposition was never taken, nor is any witness produced who ever saw the bond.

Third. On the 25th February, 1871, J. C. Stanton, professing to act as the Attorney in Fact of the Alabama & Chattanooga Railroad Company, by deed, containing covenants of seizin and warranty, conveyed the lands to Thomas Webster. (Record pp. 29, 30.)

Fourth. On the 2nd March, 1871, the Alabama & Chattanooga Railroad Company executed to J. C. Stanton, a power of

attorney, constituting him its Attorney in Fact to sell and convey the tract, describing it, using therein the words "hereby ratifying and confirming any sale or disposition said agent may make or *may have made* in the premises." (Record pp. 30, 31.)

Fifth. On the 8th April, 1871, Thos. Webster conveyed the land to Isaac H. Tower, Theodore G. Montague, Xen. Wheeler, Geo. M. Sherwood, Francis Woodbury and Louis Aufrecht. (Record pp. 24, 30.)

Sixth. The purchasers immediately went into possession of the tract, laid out streets through it, with blocks and lots, and sold a number of the lots, to parties, who at once took possession of same, and most of whom erected houses, which have been continuously occupied from the years 1872-3 until the commencement of the present action. (Record pp. 17, 18, 19.)

Seventh. On the 8th February, 1877, the Governor of Alabama executed to Plaintiffs, John Swann and John A. Billups, a quit-claim, conveying to them "all the right, title and interest' acquired by the State of Alabama, in the lands and property described in the mortgage of March 2, 1870. (Record pp. 22, 23, 24, 25.

Eighth. On the 21st March, 1881, the State of Alabama, John Swann and John A. Billups, commenced their action of ejectment, making the original purchasers from Webster, their sub-purchasers, and the assignees of the sub-purchasers, the parties in possession, or supposed to be in possession of the tract of land, defendants.

Ninth. On the trial of the cause, the Court below instructed the jury to return a verdict for the defendants, since in an action of ejectment the plaintiff must show "a *valid, legal title* to the premises sued for, or some part of the premises, or that one or more of the plaintiffs had such title;" and the plaintiffs in this case, from their own testimony, had shown that they had "no more than an *equitable* title to the premises sued for." (Record p. 38.)

The Court deeming this decisive of the controversy, declined to pass upon the other questions involved in the case.

The plaintiffs excepted to the charge of the court, and have brought the cause by a writ of error to this court.

ARGUMENT.

I.

The charge of the Court that to successfully maintain an action of ejectment, the plaintiff must have the *legal estate* in the premises, is an elementary proposition of the law.

The decisions of the Supreme Court of the United States, and of that of Tennessee are in entire harmony upon this point.

The Code of Tennessee provides that "any person having a "valid, subsisting legal interest in real property, and a right to "the immediate possession thereof, may recover the same by an "action of ejectment." [§ 3229, Code of Tennessee.]

It will be observed that under this Statute, a legal right to possession alone, will not sustain an action of ejectment; but the plaintiff must at the same time, have also a valid subsisting legal interest in the property.

Nowhere is the right of action in ejectment given to the holder of the *equitable* interest. [See Langford vs. Love, 3 Sneed 312; Campbell vs. Campbell, 3 Head. 328; Lafferty vs. Whitesides Lessee, 1 Swan., 123; Bennett vs. Butterworth 11, Howard 669; Shierburne vs. DeCordova, 24 Howard 413; Fenn. vs. Holmes, 21 Howard, 481.]

In the last named case Justice Davis in delivering the opinion of the Court, says, "That the plaintiff in ejectment must in all cases prove a legal title in himself at the time of the demise laid in the declaration and that evidence of an *equitable* estate will not be sufficient for a recovery, are principles so elementary and

so familiar to the profession, as to render unnecessary the citation of authority in support of them."

I do not understand that the learned counsel for plaintiffs in error in his brief, to contend that an action of ejectment can be maintained upon an equitable title.

II.

If the plaintiffs have any title to the premises sued for, their title is an equitable one.

The Court below in his charge to the jury upon this point says, "Upon their own testimony, they can have no more than an equitable title to the premises sued for."

That the holding of the Court was correct upon this point, is clearly shown by an examination of the record.

First. Taking it for granted, that all the parties to the record, are bound by the recitals in the deed of McMillin to the Alabama & Chattanooga R. R. Co., he executed to that company, 25th March, 1869, a bond for title to the premises, receiving at the time $3,000 of the purchase money, $9,000 being the whole.

But the bond conferred upon the vendee no *legal title*. It was simply an agreement to make a legal title upon payment of the balance of the purchase money.

Second. While the legal title was still in McMillin, and on 3rd March, 1870, the Alabama & Chattanooga R. R Co. executed to the State of Alabama, the mortgage under which the plaintiffs claim title.

At this time, it is manifest the mortgagor, at best, had no more than an equitable title.

Third. The mortgage contained no covenants for title of any description. It contains an *habendum*, but no covenent either of seizin or warranty. The mortgage is a mere quit-claim.

Fourth. The deed of McMillin to the mortgagor, which vested the mortgagor with the legal title, was executed subsequently, on the 31st March, 1870.

Now, nothing in jurisprudence is better settled than that an *after acquired title* does not pass to the vendee or mortgagee, unless there is a covenant of warranty in the deed or mortgage.

A very few only of numerous authorities need be cited.

In the case of Jackson vs. Wright, 14 Johns. 192, the Court uses this language:

"The deed from Boise to McCracken, is a bargain and sale and quit-claim, and he had then no title to convey in the premises; and no title not then *in esse* would pass unless there was a *warranty* in the deed; in which last case, it would operate as an estoppel, for avoiding circuity of action," referring to authorities.

"One in possession of land under a contract of purchase has a mortgageable interest.

"If he makes a mortgage with *covenants* of *warranty*, and afterwards acquires the legal title to the property, he is estopped to deny that he had no title at the time of the mortgage." Jones on Mortgages, §§ 679, 561, 682, 825.

But the estoppel only operates where there are covenants.

"But at the present time, and especially where a mortgage is merely a lien and not a title, this estoppel must be regarded as arising only from a covenant for title, express or implied. In the absence of such a covenant, the mortgagor may therefore show what his interest in the mortgaged lands was at the time of the delivery of the mortgage, and may show that a subsequently acquired title does not enure to the benefit of the mortgagee. A wife joining her husband in a deed of his land, but not making any covenants, is not estopped to claim title to the land under a mortgage held by her." Jones on Mortgages, § 1483. Rawle on Covenants for Title, 390; and authorities cited.

"A, having only an equitable title, conveyed lands by bargain and sale *without warranty* to B, in trust to C, and afterwards acquired the legal title and sells it to D with warranty. It was

held that the legal estate subsequently acquired by A. did not enure to B. in trust for C." Dosewell vs. Buchanan, 3 Leigh. 365.

In Comstock vs. Smith, 13 Pick. 116, it was held that,

"A covenant in a deed of land that the grantor will warrant the land against all persons claiming under him, does not estop him from setting up a title subsequently acquired by him by purchase or otherwise."

And in Doane vs. Wilcutt, 5 Gray 328 it was held that

"An indenture between tenants in common which recites their seizin in fee of certain lands and assigns a portion thereof to each to hold in severalty, and contains mutual covenants for the quiet enjoyment by each of the portion so assigned to him, does not estop one of the parties to set up an after acquired title to land so assigned to one of the others" See also Miller vs. Ewing, 6 Cush. 34. Wight vs. Shaw, 5 Cush. 64. Flagg vs. Mann, 14 Pick. 467. Blanchard vs. Brooks, 12 Pick, 66. Washburn on Real Property, Vol. 3, 106, 107.

The authorities upon this point are almost legion, and are in entire harmony, so far as my investigation has led me.

The proposition enunciated in the brief of counsel for plaintiffs in error, that the subsequent conveyance of McMillin to the Alabama & Chattanooga R. R. Company "converted the equitable title of the Company into a legal title, which at once, by operation of law, enured to the benefit of the mortgagee," is not sustained by a solitary one of the authorities cited in the brief, unless by the Bank of Greensboro vs. Clapp (N. C. R.) 482, and Cram vs. Turner 7 Hun. (N. Y.) 537, which reports are not accessible to me

An examination of the other authorities cited produces a feeling of profound astonishment, that they should be supposed to sustain the proposition. Threadgill vs. Pintard, 12 Howard. 24, 38. Cook vs. Lunsford, 2 Lea 237, and Henshaw vs. Wells 9 Humphrey 568, decide nothing bearing directly or indirectly upon the proposition they are cited to sustain, as an examination of the cases will show.

In the case of Daly vs. Willis, 5 Lea. 194, the trust deed contained covenants of seizin and warranty, and the point decided was, that when a wife joins with her husband in the operative words of a deed, the deed passes the homestead and dower estate of the wife, without specifically naming them.

Bush vs. Marshall, 6 Howard. 284, 289, is an authority for defendants in error.

The deed contained covenants of seizin and warranty, and the syllabus contains the real point decided, and is in these words: "If one who has conveyed with warranty, afterwards acquires the true title, it enures by way of estoppel to his grantee." No one disputes that.

The converse is here plainly implied, that if one who conveys *without* warranty, afterwards acquires the true title, it does *not* enure by way of estoppel to his grantee.

The case of Skidmore vs. Pittsburgh, Cincinnati & St. Louis R. R. Co., 112 U. S. 33, is no authority for the proposition it is supposed to sustain. In that case a Railroad Co. acquired an equitable interest in lands bought for railroad purposes, went into possession, and subsequently leased its line, including the land in question, to another Railroad Co., who took possession of the land, built depots and machine shops upon it, and had held it for years.

While the lessee was thus in possession the lessor acquired the legal title and the point decided in the case is expressed in the syllabus, that "the legal title to real estate acquired subsequent to the lease, by a lessor owning the equitable title, at the date of the lease, enures to the benefit of the lessee, as against a judgment creditor of the lessor whose judgment is subsequent to the lease."

The case of Van Rensselaer vs. Kearney, 11 Howard 323, cited, distinctly recognizes the doctrine, that, as a rule, an after acquired title passes only when the deed contains a covenant of warranty, but it does hold that the covenant need not be a "technical" covenant of warranty.

The deed in that case described the lands by metes and bounds, and showed on its face, that the grantor expected to convey, and the grantee to receive, a deed *equivalent* to one containing covenants of title.

The case turned upon a covenant against encumbrances recited in the deed, the grantor having, for himself and heirs, covenanted and agreed, with the grantee, his heirs and assigns, that the tract conveyed (with certain exceptions named) was "free and clear, and shall be held and enjoyed by the grantee, his heirs and assigns, according to the true intent and meaning of these presents."

The Court upon this point said, "There is much force therefore in the argument, that this covenant from its phraseology and structure, was intended as something more than a simple covenant against encumbrances and charges upon the estate; and that it was intended by the parties as a covenant of the title which the deed purported to convey, and if so, this, of itself, would operate upon the estate subsequently acquired by the grantee."

The Court held that "if the deed bears on its face evidence that the grantors intended to convey, and the grantee expected to become invested with an estate of a *particular description*, or quality, and that the bargain had proceeded upon that footing, between the parties, then, although it may not contain any covenants of title in the *technical* sense of the term, still the legal operation and effect of the instrument will be as binding upon the grantors and those chaiming under them, in *respect to the estate thus described*, as if a formal covenant to that effect had been inserted, at least, so far as to estop them from ever afterward denying that he was seized of the *particular estate* at the time of the conveyance."

What "particular estate," or what estate at all, did the Alabama & Chattanooga R. R. Co. represent that it was seized of in the land in controversy, in the mortgage of March 2, 1870?

It did not claim to be the owner of the land, much less, claim to be "invested with an estate of a particular description or quality,"

nor did it so much as mention the land in the mortgage. The only description in the mortgage which it is claimed includes the land is contained in the words, "all other property in the States of Alabama, Georgia, Tennessee and Mississippi belonging to said company."

What representations did it make respecting this land, that it, or its privies in estate, now seek to deny? How can it, or its privies in estate be estopped, by representations, that it never made?

The Court in its opinion in Van Rensselaer vs. Kearney, says: "The most important question upon the other branch of the inquiry is, has the grantor affirmed on the face of the deed, that he was seized of this particular estate in the premises at the time he made the grant?"

Again the Court says: "The principle deducible from these authorities seems to be, that whatever may be the form or nature of the conveyance, used to pass real property, if the grantor *sets forth upon the face of the instrument*, by way of recital or averment, that he is seized of a particular estate in the premises, and which estate the deed purports to convey; or what is the same thing, if the seizin or possession, of a particular estate, is affirmed in the deed, either in express terms, or by necessary implication, the grantor and all persons in privity with him, shall be estopped from ever afterward denying that he was so seized and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after acquired title as between parties and privies."

How this language can be tortured into an authority for the proposition, in the case at bar, that the after acquired title enured to the benefit of the grantee in the mortgage, when the land is not named or described in the mortgage, and no representations of any character are made respecting it, or any of the other property embraced in the mortgage, passes my comprehension.

The doctrine of estoppel is invoked in behalf of plaintiff in error.

But, in the mortgage, no claim is made that the mortgagor owns the land or any interest in it. There is nothing upon which an estoppel can take effect. The mortgagor said nothing that it, or its privies in estate, have since attempted to deny.

The language of the Court in Flagg vs. Mann, 14 Pickering, 467, appropriately concludes the argument upon this branch of the case.

"The reason which governs estoppels is, that after a man, has, by his own deed, or act, *in pais* admitted a fact to be true, he shall not be permitted to contradict it. This is a necessary rule constantly enforced in the course of judicial inquiries."

It applies as well to the law, as to the facts which are to be ascertained Matters which have been alleged, or admitted by a party to be true, shall not be by him disproved. * * *

"The estoppel ought to be certain to every intent, and it should not be alleged by way of inference or argument."

As then the Alabama & Chattanooga R. R. Co. had nothing but the equitable estate in the land sued for, if it had that, when it made the mortgage of 2nd March, 1870, to the State of Alabama, and the mortgage contained no covenants for title the subsequently acquired title through the deed of McMillin of 31st March, 1870, did not enure to the benefit of the mortgagee, and the State of Alabama, and the other plaintiffs in this action, have never held and do not now hold the legal estate, and without this legal estate they cannot maintain an action of ejectment.

This is the view the Court below took of the case, and from this reasoning it is believed there is no escape.

II.

While the Court below declined to pass upon any of the other questions involved in the case, deeming it unnecessary to do so, it is respectfully submitted, that another point in the case is as fatal to plaintiffs, as their lack of a legal estate.

That is, that the land sued for, is not embraced in the mortgage.

"The description of the property upon which the mortgage is an encumbrance, must be such as reasonably to enable subsequent purchasers to identify the land; otherwise the record of the mortgage is not notice of any incumbrance upon it." Jones on Mortgages, § 528.

It is not insisted, that the description of land in a deed or mortgage, must be specific. On the contrary, there is abundance of authority to the effect, that general words of description are frequently sufficient, upon the familiar principle, "that is certain which is able to be made certain."

If, however, the description in the mortgage which is claimed to embrace the land in controversy, is examined, it will be seen, not only that there is no specific description, but there is nothing that will enable a subsequent purchaser to identify this land as forming any part of the property intended to be included in the mortgage

It will be remembered that the conveyance from McMillin to the mortgagor was subsequent to the mortgage, and was subsequently registered. The "subsequent purchaser" in examining the title of the proposed purchase, would find no record of McMillin having parted with any interest of the land until March 31st, 1870, for the bond named in that deed was not registered. His researches would therefore be naturally directed to the title of the grantee *after* it acquired the title.

But if he was sufficiently astute to look backward, and examine if the grantee had conveyed the property before he became the owner, he would find that before the execution of the deed to the grantee, but after the date of the execution of the bond recited in the deed, the grantee had executed a quit-claim mortgage, in which among the property mortgaged, he would have found no description of the land, the title to which he was examining, but that there was included "all other property in the States of Alabama, Georgia, Tennessee and Mississippi belonging to said company." If these words had attracted his attention, and he had been in doubt, if these words of descrip-

tion might not include the land he proposed purchasing, he would examine carefully the descriptive words immediately preceding, and succeeding the general words above named, and he would have found that the words "all other property" occur with words limiting their application, words descriptive of personal property and chattels real. The mortgage included not only the lands in the State of Alabama granted by Congress to the mortgagor, but embraced also "the telegraph line and telegraph offices along the line of said road and belonging to said company; also the machine shops and all other property in the States of Alabama, Georgia, Tennessee and Mississippi belonging to said company; also all coal mines now open or hereafter to be opened and worked by said company; and also *all iron or other mineral lands*; all iron manufacturing establishments now in operation or hereafter to be constructed."

The "subsequent purchaser" would, if he remembered the legal maxim "*noscitur a sociis*," conclude that the general words "all other property" were restricted by the words preceding them, and that the words were descriptive of "all other property" of the nature of telegraph lines, telegraph offices and machine shops.

And in reaching this conclusion he would experience no difficulty in finding abundance of authority.

"It is a rule of legal construction, that general words following an enumeration of particulars, are to have their generality limited by reference to the preceding particular enumeration, and to be construed as including only all other articles of like nature and quality." Rapalje & Lawrence Law Dictionary, Vol. 1, 435.

In Chidsey vs. Canton, 17 Conn. 479, the Court in construing a statute which provided that "if any horse, or other beast, or cart, carriage, or *other property*, shall receive any injury or damage, through or by means of any defective road or bridge," by the words "or other property," must be understood property of the kind enumerated in connection with those words; and where in another section it is provided that "if any person or property shall suffer any damage by reason of any defect in such railing," &c., the Court held that while there was not in this clause, as in

the preceding, "any words used in connection with the word property, calculated to limit its operation to any particular species," yet that word "immediately follows one in which the operation of the term is limited, and must be considered as having the same construction."

Harwood vs. City of Lowell, 4 Cush. 313, was a case arising under a statute which provided "a remedy for any person who shall lose a limb, break a bone, or receive any other injury in his person, or in his horse, team or *other property*, through any defect," &c.

The Court held, Chief Justice Shaw delivering the opinion, 'that the remedy was confined to loss or damage done to visible or tangible property, such as animals, goods or chattels."

* * * * "There is a good rule of construction, *noscitur a sociis*, where several particulars are enumerated followed by a word more general, the provision is thus limited to things of like kind." Therefore, though the word "property' is used, it follows words designating goods and chattels, and could not extend to mere rights."

The case of the People vs. N. Y. and Manhattan Beach R'y Co., 84 N. Y. 565, was almost precisely such a case as the one at bar, in this respect.

It was an action to recover real property, under an Act, authorizing actions to be brought by the people of the State to recover "money, funds, credits and *property*" held by public corporations, boards, officers and agents, for public purposes, which had been wrongfully converted or disposed of." The Court in its opinion says:

"It is to be observed that the word *property* follows the enumeration of specific kinds of personal property." The words are "money, funds, credits and property." * * * * * "The word property, associated as it is with the preceding words of specific description, is to be construed as referring to property of the same general kind with that previously enumerated, upon the maxim *noscitur a sociis*." [See also, "Matter of Hermance *et al.*" 71, N. Y. 487, where same proposition is laid down and

authorities cited. Corning *vs.* Comstock 1, Comstock 69; Clark *vs.* Gaskarth, 8 Taunt., 431; Bishop on Written Laws, § 245]

If, after examining the words descriptive of property preceding the words "All other property," he still entertained a doubt, if those general words might not include the land he proposed purchasing, an examination of the words descriptive of property, immediately following the general words, would relieve his doubts. He would find, there was included in the mortgage "Also *all coal mines* now open or hereafter to be opened and worked belonging to said company, and *all iron* or *other mineral lands*, and *all iron manufacturing establishments*, now in operation or hereafter to be constructed."

He would naturally reason, that if the draughtsman of the mortgage had intended to include this land—in which the mortgagor, at the best, had only an equitable interest, and that interest was unknown to the world, since there was no record of the title bond—he assuredly would not, after the words "All other property in the States of Alabama, Georgia, Tennessee and Mississippi, belonging to said Company, have added," "*All coal mines*," "*All iron* or *other mineral lands*," "*All iron manufacturing establishments*."

If the last named property, of the same kind as this land, was included in the words "All other property," why proceed in the same connection to enumerate real estate?

"*Expressio unius est, exclusio alterius.*"

The fact that the draughtsman, immediately after the words "all other property," describes specific real estate, shows conclusively that those words were not designed to embrace real estate, but, rather property of the same kind as that previously enumerated.

The application of the maxim "*noscitur a sociis*" in the case of the People vs. New York & Manhattan Beach Ry. Co. already cited, was not nearly so clear as in the present case.

The language of the Act in that case was "money, funds, credits and property," with no after words as here, descriptive of real estate.

III.

The Act of the General Assembly of the State of Alabama approved Feby. 23, 1876, and the deed of the Governor of the State executed in pursuance of the same, conveying to Swann and Billups all the interest of the State in the mortgaged property, is invalid and void as to the mortgagor and those claiming under the mortgagor, because they impair the obligation of contracts.

I think it unnecessary to elaborate this point, as I deem either of the preceding points made in this argument decisive of this suit.

The point is made and discussed at length, in the brief of Counsel of Appellees in case No. 984, in the Court, a case brought by plaintiffs in error, to foreclose the supposed mortgage upon the land in controversy. To the argument in that brief, upon this branch of the subject, the attention of the Court is respectfully solicited.

XENOPHON WHEELER,

Of Counsel for Defendant in Error.

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 984.

THE STATE OF ALABAMA, JOHN SWANN AND JOHN A. BILLUPS, TRUSTEES AND ASSIGNEES, APPELLANTS,

vs.

T. G. MONTAGUE ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

FILED SEPTEMBER 29, 1885.

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1 Be it remembered that at a circuit court of the United States, began and held for the southern division of the eastern district of Tennessee, at the court-house in the city of Chattanooga, within said district and the sixth circuit, on the first Monday, it being the 7th day of April, A. D. 1884—present and presiding, the Honorable D. M. Key, judge, &c.—the following proceedings were had, to wit:

TUESDAY MORNING, *April 8th*, 1884.

Court met pursuant to adjournment.

Present and presiding: The Honorable D. M. Key, judge, &c.

JOHN SWANN *et als.* *vs.* T. G. MONTAGUE *et als.* } No. 73. In Equity.

Come the complainants, by attorney, and move to remand this cause to the chancery court of Hamilton county, Tennessee.

FRIDAY MORNING, *April 18th*, 1884.

Court met pursuant to adjournment.

Present and presiding: The Honorables John Baxter and D. M. Key, judges, &c.

2 STATE OF ALABAMA *et als.* *vs.* T. G. MONTAGUE *et als.* } No. 73. In Equity.

In this case, upon application, the defendants who have made application to remove this cause to this court are allowed to amend their petition for the removal of the cause the more clearly to show that there is a separate controversy between the petitioners and the complainants which can be fully determined as between them without the presence of the other defendants, which is done. And thereupon the cause came on to be heard upon the motion of complainants to remand the cause to the chancery court at Chattanooga, which motion, being argued by counsel and fully understood by the court, is overruled and disallowed.

FRIDAY MORNING, *May 9th*, 1884.

Court met pursuant to adjournment.

Present and presiding: The Honorable D. M. Key, judge, &c.

STATE OF ALABAMA *et als.* *vs.* T. G. MONTAGUE *et als.* } No. 73. In Equity.

3 This cause came on to be heard on this 9th day of May, 1884, upon the demurrer filed in the cause by certain defendants named therein to the bill of complaint, which, being argued by counsel and being fully understood by the court, the court is of opinion that said demurrer is not well taken, and the same is therefore overruled.

The defendants are allowed sixty days in which to answer, so as

not to delay, and in their answer they will be allowed to rely upon the same causes of demurrer set out in the demurrer.

It appearing to the court that summons heretofore issued in this case has been returned, and that the defendants, O. L. Wagner, J. Kechner, and W. J. Keilen are not to be found after diligent search, now, on motion of complainants' solicitor, it is ordered by the court that an order of publication be made in a newspaper published in Chattanooga, Tennessee, for thirty days, requiring the said defendants to answer, demur, or plead to the said bill by the next term of this court, or a decree *pro confesso* will be taken against them.

4 And it appearing to the court that an order of publication was made and duly published heretofore in this cause, requiring the defendant, Lewis Aufrecht, to demur, to answer, or defend the said bill, and he having failed up to this time to enter his appearance and defend the said suit, it is now ordered that the said be, and the same is hereby, taken as confessed as against the said defendant, Lewis Aufrecht, and set for hearing *ex parte* as to him.

And it appearing to the court that summons heretofore issued has been duly served on the minor defendant, Cornelia Carlile, now, on motion, it is ordered by the court that W. W. Yonge, he being a fit and proper person, be, and he is hereby, appointed guardian *ad litem* for said minor.

And, on motion, this bill is dismissed as to defendant, Elise Carlile, it appearing that she has no interest in this suit.

On motion, the bill is allowed to be amended by inserting the name of "Thomas" before the name of defendant, "—— Lane," and it is ordered that an *alias* summons issue as to the said defendant, Thomas Lane.

1884, Aug. 4. At rules.

5 Come the complainants, by their solicitors, and moved for judgment *pro confesso* as to the defendants, Thos. Webster, Sarah M. Sherwood, W. W. Yonge, Nellie Yonge, D. F. Blanton, Charles Paxton, Maggie Roberts, Wm. Roberts, J. Foster Rogers, Bradford Post, Walter Carlile, Albert D. Mahoney, Anna Cole, and Thomas Lane, and it appearing that said defendants have been duly served with process and are properly in court, and it further appearing that the said defendants have failed to make answer to this suit or other defense thereto, it is ordered by the clerk at rules that judgment *pro confesso* be, and the same is hereby, regularly entered against the said defendants, and that the cause be heard *ex parte* as to them.

And come the complainants, by their solicitors, and dismiss their suit as to the defendant minor, Cornelia Carlile.

Be it remembered that at a circuit court of the United States, began and held for the southern division of the eastern district of Tennessee, at the court-house in the city of Chattanooga, within said district and the sixth circuit, on the first Monday, it being the 6 6th day of October, A. D. 1884—present and presiding, the Honorable D. M. Key, judge, &c.—the following proceedings were had, to wit:

THURSDAY MORNING, *October 9th*, 1884.

Court met pursuant to adjournment.

Present and presiding: The Honorables John Baxter and D. M. Key, judges, &c.

THE STATE OF ALABAMA *et al.*
vs.
T. G. MONTAGUE *et al.*
} In Equity.

This cause was submitted for final decree on the pleadings and evidence on file; upon consideration whereof the court is of opinion that the statute of limitations is a bar to the relief sought by complainants, and it is therefore ordered, adjudged, & decreed that the bill of complaint be dismissed out of this court, & that complainants pay the costs to be taxed by the clerk of this court, for which an execution is awarded.

And thereupon, in open court, the said complainants prayed an appeal from the foregoing decree in this cause to the Supreme
7–8 Court of the United States according to law, and upon said prayer the said appeal was granted and allowed by this court upon any one of the complainants entering into an appeal bond, with good security, in the sum of five hundred dollars, payable to said defendants, T. G. Montague & others, conditioned to prosecute said appeal to effect & answer all damages & costs if they fail to make their plea good; and then in open court the said bond was given by the complainants and approved by the court & the presiding judge thereof, and said bond was ordered by the court to operate as a supersedeas bond.

To the clerk: Enter the foregoing.

BAXTER, *J.*

Endorsed: State of Ala. *vs.* T. G. Montague *et als.* Decree & appeal.

9 At a regular term of the chancery court of Hamilton county, Tennessee, begun and held at the court-house in the city of Chattanooga, said county and State, on the third Monday, it being the 15th day of October, 1883, present and presiding the Hon. W. M. Bradford, chancellor in and for the third chancery division of said State, the following proceedings were had, viz:

Style of Suit.

JOHN SWAN *et al.*
vs.
T. G. MONTAGUE *et al.*
} No. 2879.

Prosecution Bond.

I acknowledge and bind myself the security for the payment of all costs that may be adjudged against the compl'ts in this cause. This 28th May, 1883.

W. L. EAKIN.

Endorsed: Filed 28th May, 1883. S. M. McConnell, C. & M., by J. B. Rayon, D. C. & M.

Original Bill.

To Chancellor W. M. Bradford, presiding and holding the chancery court of Hamilton county, Tennessee;

10 Complainants John Swan, a citizen of England, and John A. Billups, a citizen of the State of Alabama, as trustees and assignees under an act of the General Assembly of the State of Alabama hereafter mentioned, and the State of Alabama, complain of Frederick Wolffe, assignee in bankruptcy, in the matter of the Alabama and Chattanooga Railroad Company, as such assignee, appointed in and by the district court of the United States for the middle district of Alabama, sitting in a court of bankruptcy at Montgomery, and who is a non-resident of the State of Tennessee and a citizen of the State of Alabama, and Theodore G. Montague, Xenophon Wheeler, Thomas Webster, George M. Sherwood, and wife Sarah M. Sherwood; Marion Carlile, widow of Thomas J. Carlile; W. W. Younge, and wife Nellie Young; and Cornelia and Eloise Carlile, the latter two of whom are minors and have no regular guardian; D. F. Blanton, Mattie Worthy & husband, Samuel Worthy; Anna Cole, Thomas Lane (col'd), Charles Paxton, Maggie Roberts' husband, —— Roberts; G. C. Rhineheart, Jacob
11 Peyer, Jacob Kruber, J. Kechner, W. J. Keilin, W. Q. Congle, J. Foster Rogers, Maggie Roberts, William Roberts, O. L. Wagner, J. P. McMillin, D. C. McMillin, Jr., and Jas. A. Bass, all residents of Hamilton county, Tennessee, and citizens of Tennessee; Isaac H. Tower, Lewis Aufrecht, Charles Woodburry, Bradford Post, Walter Carlile, Albert D. Mahoney, Jacob Kruber, who are non-residents of the State of Tennessee.

Complainants state that heretofore, to wit, on the 2d day of March, 1870, the State of Alabama, under and in pursuance of the provisions of an act of the General Assembly of said State of Alabama, approved February 11th, 1870, a true copy of which is hereto attached marked "Exhibit A," and made a part of this bill, but need not be copied, did issue, loan and deliver to the Alabama and Chattanooga Railroad Company, the bonds of said State of Alabama to the amount of two millions of dollars ($2,000,000), bearing interest at the rate of eight (8%) per cent. per annum, payable semi-annually as provided in said act.

Complainants state that said railroad company, by its
12 proper officers and by the rightful authority of said railroad company, in consideration of said loan of two millions of dollars in bonds, issued and delivered to said railroad company by said State of Alabama, and in pursuance of the terms and conditions of the said act of the General Assembly of the State of Alabama, did issue and deliver to the State of Alabama, the first mortgage bonds of said railroad company to the amount of two millions of dollars, bearing date March 2d, 1870, in the denomination of one thousand dollars each, numbered consecutively from one to two thousand, inclusive, the principal falling due December 2d, 1899, with coupons attached to each bond for the interest at the rate of eight per cent. per annum, and payable semi-annually, and each

coupon on each bond being for forty dollars ($40.00), all payable in coin at the treasury of the State of Alabama. One of said bonds with the interest coupons thereon, which remain unpaid, is attached hereto and made a part of this bill, and is marked "Exhibit
13 B," but need not be copied. Each of the other bonds with the coupons thereon remaining unpaid, of said railroad company to the amount of two millions of dollars, are in substance the same as that shown in "Exhibit B," only differing in number, and will be produced upon the hearing of this cause, or sooner if required by order of the court.

Complainants further state and charge that the said railroad company in pursuance of the terms of said act of the General Assembly of Alabama, approved February 11th, 1870, and in consideration of the the said loan of two millions of dollars in bonds issued by the State to said railroad company, and to secure the payment of said loan, and the bonds of said company issued and delivered by said railroad company for said loan did execute a first mortgage to the State of Alabama, dated March 2d, 1870, a true copy of which is hereto attached marked Exhibit "C" and made a part of this bill, but need not be copied.

Said mortgage was duly registered in the register's office of Hamilton county, Tennessee, on the 24th day of March, 1870, and it conveyed to the State of Alabama certain lands in that State
14 and also embraced "the telegraph lines, telegraph offices along the line of said railroad belonging to said railroad company; also the machine shops and all other property in the States of Alabama, Tennessee, Georgia, and Mississippi then belonging to said company; also all coal mines then open or thereafter to be opened and worked belonging to said company, as well as iron or other mineral lands, and all iron manufacturing establishments then or thereafter to be constructed.

Complainants state and charge that said two millions of dollars in the bonds of said Alabama and Chattanooga Railroad Company were issued to the State of Alabama, and that said mortgage was duly and legally executed, acknowledged, and registered as required by law, to secure the State of Alabama for the loan of her bonds to the said amount of two millions of dollars in pursuance of the terms of said act of February 11th, 1870, hereto exhibited.

Complainants further state and charge that the said Ala-
15 bama and Chattanooga Railroad Company has wholly failed to pay any portion of the principal of its said two millions of dollars in bonds issued as aforesaid to the State of Alabama, and has not paid any interest thereon since January, 1876, and that all the principal of said bonds and the coupons for interest falling due since January, 1876, is wholly unpaid.

Complainants state said Alabama and Chattanooga Railroad Company was declared and adjudicated an "involuntary bankrupt in the district court of the United States for the middle district of Alabama, while sitting as a court of bankruptcy for the middle district of Alabama, at Montgomery, Alabama, and that Frederick Wolffe, who is a non-resident of the State of Tennessee, is now the assignee

in bankruptcy of said bankrupt company, duly appointed and acting under said proceedings in said court of bankruptcy.

Complainants further state and show unto your honor that by virtue of and under a provision of an act of the General Assembly, of Alabama, approved on the 23rd day of February, 1876,
16 a true copy of which is hereto attached, marked Exhibit "D," and made a part of this bill, but need not be copied; that complainants, John Swann and John A. Billup, were on the — day of February, 1877, vested and clothed with title to and placed in the possession of the said two millions in bonds issued by the Alabama and Chattanooga Railroad Company, as hereinbefore set forth as trustees and assignees, as well as right to the security and all rights and remedies the State of Alabama had under and by virtue of the said mortgage, executed by the said Alabama and Chattanooga Railroad Company to the State of Alabama, and whatever rights of any nature or character, legal or equitable, the State of Alabama had in and to said two millions in the bonds of said railroad company, and the security the State of Alabama had under and by virtue of the said mortgage these complainants, Swann & Billups, have the right to enforce the same under the provisions of said act of February 23d, 1876, subject, however, to the claim of the State of Ala-
17 bama to ten per cent. of the net proceeds of the sales of mortgage property according to the provisions of said act of February 23d, 1876.

Complainants state and charge that George S. Houston, then Governor of the State of Alabama, in his official capacity did, on the — day of February, 1877, in pursuance of the act of the General Assembly of the State of Alabama approved February 23d, 1876, executed a deed to complainant-, Swann and Billups, a true copy of which is hereto annexed, marked Exhibit "E," and made a part of this bill, but need not be copied, from all of which acts of the General Assembly of the State of Alabama, and the mortgage and bonds of the Alabama and Chattanooga Railroad Company, and the deed of George S. Houston, Governor of the State of Alabama, it will most fully appear that these complainants, John Swann and John A. Billups, as trustee- and assignees, are fully and to all intents clothed with all the rights of the State of Alabama, and may use all the remedies that the mortgagee might have done and all such other rights and remedies as are given them under said acts of the
18 General Assembly of the State of Alabama aforesaid.

They refer to all of said acts of the General Assembly of Alabama, the mortgage executed by the Alabama and Chattanooga Railroad Company to secure the State of Alabama for the loan of its bonds, the bonds and the deed from the Governor of Alabama to John Swann and John A. Billups, as trustees and assignees, for a more detailed statement of their rights.

Complainants state that at the time, as well as before, said mortgage was made by the Alabama and Chattanooga Railroad Company, viz., on the 2d day of March, 1870, the said company was the owner and in the possession of a piece or parcel of land in said county of Hamilton, Tennessee, described as lying and being within the

corporate limits of the city of Chattanooga, Tennessee, "beginning at a stake the southeast corner of a five-acre tract or lot, two hundred and thirty-three and one-third feet (233⅓ ft.) from J. B. Weave's southeast corner, running thence south (70° E.) seventy degrees east (787 ft.) seven hundred and eighty-seven feet
19 to a stake; thence (N. 70° W.) north seventy degrees west (568½ ft.) five hundred sixty-eight and one-half feet to the southeast corner of the three-acre tract occupied by A. O. Fisher; thence with the line of said three-acre tract or lot (392 ft.) three hundred and ninety-two feet to a stake in the line formerly owned by John P. Long, but afterwards owned by S. J. Boyce, and now probably owned by James P. Boyce; thence (N. 70° W.) north seventy degrees west with said line (531 ft.) five hundred and thirty-one feet to a stake, Staylon's northeast corner; thence south with Staylon and Mund's line (392 ft.) three hundred and ninety-two feet to a stake; thence south (70° E.) seventy degrees east (316 ft.) three hundred and sixteen feet to a stake, the northeast corner of the said Billingsly lot, or "five-acre tract;" thence with the line of said Billingsley five-acre lot (933⅓) nine hundred and thirty-three and one-third feet to the beginning, containing twenty-two acres, purchased from J. P. McMillin by the Alabama and Chattanooga Railroad Company on the 25th day of March, 1869, which said tract or lot of land really was property belonging to said railroad company
20 at the time said mortgage was executed, and was really included and embraced in said mortgage, executed as aforesaid by the said Alabama and Chattanooga Railroad Company to the State of Alabama. Under said acts, mortgage, and said deed, executed by said Houston, Governor of Alabama, on the — day of February, 1877, complainants, Swann and Billups, as trustees and assignees, succeeded upon, and after the execution of said last-mentioned deed and ever since the execution of that deed, have a perfect right to enforce.

Complainants are informed and advised, & on information and belief state, that the respondent, Thomas Webster, without paying, expending, or advancing any money in any manner whatever, and long after said mortgage was made by the Alabama and Chattanooga Railroad Company and executed and duly registered in Hamilton county, Tennessee, with notice of said mortgage, pretended to take and set up some kind of claim to said twenty-two acres of land, which claim is, as to complainants, wrongful, lawless, and undefensible. Complainants state and charge that said Thomas
21 Webster, among other devices to defeat and injure said mortgage or those claiming under said mortgagee in said mortgage, has associated with him the other respondents, who have been asserting a claim of some kind upon portions of said land, which claim is as to complainants wrongful and lawless.

The defendants, or some of them, claim to have laid off said twenty-two acres upon paper into lots, streets, and alleys, and, in some instances, it is believed made deeds or title bonds to codefendants, have offered it for sale, and are now asserting that they are the owners thereof, and have placed these and other wrongful and un-

lawful obstacles in the way of the rights of complainants, which makes a cloud upon complainants' title, but complainants here expressly state and charge that any pretended title or claim the said Thomas Webster or any of his codefendants may have or make to said lands was derived from the mortgagor long after the registration of said mortgage, and that said Webster and all the defendants who claim under said Webster, as well as all the defendants,
22 took their pretended titles after the registration of said mortgage and with at least constructive notice of the rights of the mortgagee therein.

Complainants state, upon information and belief, that all the defendants who claim an interest mediately or immediately from Thomas Webster had actual notice of this mortgage as well as constructive notice thereof.

The premises considered, complainants pray that all the parties mentioned as such be made parties defendants and required to answer each allegation in this bill, but none of them are required to answer on oath, the oath of each defendant being expressly waived; that upon the final hearing a decree be rendered foreclosing said mortgage made by the Alabama and Chattanooga Railroad Company to the State of Alabama, and declaring that the complainants are entitled to all the securities embraced in said mortgage, accord- to the terms of the acts of the General Assembly of Alabama.

That all the pretended deeds, title bonds, or other papers set up by Thomas Webster, or from him to any of his co-respond-
23 ents, and all deeds, title bonds, or decrees, or any other paper purporting to convey any title to any portion of said land of any nature whatever, be declared null and void for fraud, in fact or in law, and that they all be declared null and void & of no effect, and the cloud they cast upon compl'ts' title removed. That all the respondents who occupy any of said lands be ejected therefrom; that complainants, Swann and Billups be placed in possession of all of said twenty-two acres of land, and if mistaken in their special prayer, they pray for all such general relief as they are entitled to receive in a court of equity.

That summons, copy, and process issue as to all the respondents who reside in the State of Tennessee, and that publication be made as to all the respondents who are non-residents, returnable to next August rules of the chancery court of Hamilton county, Tennessee.

JOHN SWANN,
JOHN A. BILLUPS.
THE STATE OF ALABAMA,
By W. L. EAKIN, *Sol.*

SAM'L F. RICE,
W. L. EAKIN,
Sol. for Compl'ts.

24 STATE OF TENNESSEE, *Hamilton County:*

Before me, T. M. McConnell, personally appeared D. J. Duffy, agent of John Swann, & made oath that the statements set forth in

the foregoing bill are true to the best of his knowledge, information, and belief.

D. J. DUFFY.

Sworn to & subscribed this 25th April, 1883.

T. M. McCONNELL, *C. & M.*

Endorsed: "Filed 28th May, 1883. T. M. McConnell, C. & M., by J. B. Ragon, D. C. & M."

EXHIBIT "A" to original bill.

Enrolled.

An act to loan the credit of the State of Alabama to the Alabama and Chattanooga Railroad Company for the purpose of expediting the construction of the railroad of said company with the State of Alabama.

SECTION 1ST. Be it enacted by the General Assembly of Alabama, That for the purpose of expediting the construction of the railroad of the Alabama & Chattanooga Railroad Company within the State of Alabama, the Governor of the State of Alabama be, and he is hereby, required on the application of the Alabama and Chattanooga
25 Railroad Company to issue the bonds of the State of Alabama to an amount not exceeding two millions of dollars in favor of the said Alabama and Chattanooga Railroad Company, bearing interest at a rate not exceeding eight per cent. per annum, which said interest shall be payable semi-annually, in currency or coin, and the bonds shall be payable at the expiration of not less than fifteen years nor more than thirty years: Provided, however, That said bonds shall be issued from time to time to and in favor of the said Alabama and Chattanooga Railroad Company only in such sums as shall be shown by sufficient evidence to the Governor of the said State to have been expended by the said Alabama and Chattanooga Railroad Company in the construction and equipment of its said railroad, in addition to and besides the proceeds of the bonds endorsed by the State which the said railroad company shall have received under the laws of the said State now in force: And provided further, That the Governor of the said State shall only issue said bonds upon receiving in exchange therefor an equal amount
26 of first mortgage bonds of said railroad company, bearing the same rate of interest as the above-mentioned State bonds, and secured by first mortgage upon the lands granted by the United States to said railroad company, and upon any interest which said company now has or may hereafter lawfully acquire in or to said lands, with this reservation, that the said Alabama and Chattanooga Railroad Company shall have the privilege and right of selling said lands, or any part thereof, in accordance with the act of Congress granting the same: Provided, however, That the proceeds of said sale shall be appropriated to the payment of the aforesaid first mortgage bonds of the said railroad company issued to the State: Provided further, That the Governor shall re-

quire said railroad company, before issuing to said company said bonds, to give the State of Alabama a first mortgage on the telegraph line and telegraph offices along the line of said road belonging to said company; also on the machine shops and all other property in the State and in Georgia, Tennessee, and Mississippi belonging to said company; also
27 on all coal mines now open, or hereafter to be opened and worked, belonging to said company; also upon all iron or other mineral lands and all iron-manufacturing establishments now in operation and hereafter to be constructed: Provided, further, That the directors or other officers and incorporators and stockholders of said railroad company who shall knowingly violate, or permit the violation without objection, any provision of this act, or of the act under which said company is now receiving the endorsement of the State upon its bonds of sixteen thousand dollars per mile, shall be held personally liable to the State for any loss incurred thereby: And provided further, That if, in the opinion of the Governor of the said State, the above first-mortgage bonds shall not be sufficient to amply secure the State from all harm and loss for the issue of [the] above-mentioned State bonds to said railroad company, then he shall require of said railroad company, and said railroad company shall give, such additional amount of the second-mortgage bonds of said railroad company, secured by second mortgage
28 on its railroad outfit, equipment, iron road-bed, and all other property, as in his judgment will be amply sufficient to secure and protect the State from any loss by the issue of said State bonds, and the first-mortgage bonds of said corporation mentioned in this section delivered to the State under the provisions of this section, both principal and interest, shall be payable at the treasury of the State of Alabama, and the coupons for the interest on said last-named bonds shall be made payable thirty days before the corresponding coupons shall be payable on the State bonds delivered to said company, so that the interest to be paid on said State bonds shall be thus provided for by the payment of the interest on the bonds of said railroad company, provided that the bonds issued by virtue of this act shall not be sold for less than the sum of ninety cents on the dollar: Provided, That no money accruing from the sales of the bonds specified in this act or bonds endorsed by the State for said railroad company shall be applied in the construction or equipment of any railroad outside of this State, or for
29 other purposes: And provided further, Or while the aid is granted by this act, the Alabama and Chattanooga Railroad Company shall not charge more than four cents per mile for each passenger travelling over its line, and shall not charge more than twenty-five per cent. higher rates for carrying local freight than it does for carrying through freight: Provided, That the loan and endorsement to the said Alabama and Chattanooga railroad shall cease if the entire line between Meridian and Chattanooga shall not have been finished by the first day of March, one thousand eight hundred and seventy-one.

Section 2d. Be it further enacted, That the aid granted in the

foregoing section of this act shall be accepted upon the following conditions: That said company shall from and after five years from the date of the bonds provided to be issued in the foregoing section, set aside as a sinking fund one per cent. of the amount of said bonds, which said amount shall be so set aside every year until the tenth year, when two per cent. shall be set aside every year until the fifteenth year; then three per cent. shall be set aside until the twentieth year, and after the twentieth year four per cent. shall
30 be provided * * * year until the maturity of the debt, which said sinking * * * shall be applied by said company regularly as it is provided * * * set aside to the purchase of their bonds under the foregoing * * * of this act; which said bonds shall be presented to the *and* * * * of the State, by him canceled and returned to said company, and such presentation and cancellation of said bonds to the amount required each year shall be a full compliance with the provisions of the foregoing section of this act.

Section 3d. Be it further enacted, That before any bonds of the State shall be delivered to the said Alabama and Chattanooga Railroad Company under this act the said company shall, in addition to what is hereinbefore required of it, deliver its bond or bonds, with such undoubted personal security, as shall be approved by the Governor of this State, and in such amount or amounts as he may prescribe, not less in the aggregate than the total amount of the bonds of the State; which said company may be entitled to receive under this act, conditioned that the entire line of said railroad of said
31 company within this State shall be completed and equipped in first-class style and the cars running thereon on or before the 1st day of June, 1871, and that if the said entire line is not completed and equipped and the cars running thereon on or before said 1st day of June, 1871, the obligors on said bond or bonds required by this section of this act shall thereupon and immediately become liable, jointly and severally, to the State of Alabama for the entire amount of the bonds of the State which said company may receive under this act.

Section 4th. Be it further enacted, That it is hereby made the duty of said company to purchase all the materials which it may need in the construction and equipment of its said road from residents of this State whenever it can do so as low as such materials can be purchased out of the State and without subjecting itself to any delay in the construction or equipment of its road.

(Signed) A. J. APPLEGATE,
President of the Senate.

(Signed) GEORGE F. HARRINGTON.
Speaker of the House of Representatives.

Approved Feb'y 11th, 1878.

(Signed) WM. H. SMITH, *Governor.*

Endorsed:

SENATE CHAMBER, *February 8th*, 1870.

I hereby certify that the within act originated in and passed the Senate.

32 (Signed) M. P. BLUE,
Secretary of the Senate.

OFFICE OF SEC'Y OF STATE,
MONTGOMERY, ALABAMA, *February 12th*, 1870.

I hereby certify that the within is a correct copy of the original act on file in this office.

[Alabama Great Seal.]

CHAS. A. MILLER,
Sec'y of State.

[$2.00 Stamp of Alabama on Seals.]

Endorsed: "Filed 28th May, 1883. T. M. McConnell, C. & M., by J. B. Ragon, D. C. & M."

EXHIBIT "B" to original bill.

Land Bond Alabama [&] *Chattanooga Railroad Company.* *No.* 1999.
Date, March 2, 1870. *Amount*, $1,000.

First-mortgage land bond.

$1,000. No. 1999.

The Alabama & Chattanooga Railroad Co. promises to pay to the bearer hereof one thousand dollars in coin, for value received, on the second day of December, A. D. 1899, at the treasury of the State of Alabama, with interest at the rate of eight per centum per annum, payable semi-annually, in coin, at the same place, on the second day of December and first day of June in each year on the delivery of the proper annexed interest warrant.

33 This bond, with others of like date and tenor, is one of a series of bonds, amounting in all to two millions of dollars, and secured by a mortgage of the land grant and certain other property of the company, bearing date March 2, A. D. 1870.

In witness whereof the Alabama & Chattanooga Railroad Company has caused its corporate seal to be hereto affixed and this bond to be signed by its president and secretary on this second day of March, A. D. 1870.

[Seal Alabama & Chattanooga Railroad Company.]

D. W. STANTON, *President.*

A. T. THAYER, *Secretary.*

(Interest warrants.)

60.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on December 2, 1899, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

59.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on June 1, 1899, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

58.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bear- at the treasury of the State of Alabama on December 2, 1898, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

57.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on June 1, 1898, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

56.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on December 2, 1897, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

35

55.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on June 1, 1897, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

54.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on December 2, 1896, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

53.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on June 1, 1896, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

52.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on December 2, 1895, being six months' interest on land bond No. 1999, for 1,000.

$40. D. W. STANTON, *Pres't.*

36

51.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on June 1, 1895, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

50.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on December 2, 1894, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

49.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on June 1, 1894, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

48.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Ala-
37 bama on December 2, 1893, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

47.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on June 1, 1893, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

46.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on December 2, 1892, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

45.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on June 1, 1892, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

38

44.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on December 2, 1891, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

43.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on June 1, 1891, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

42.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on December 2, 1890, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

41.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on June 1, 1890, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

40.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on December 2, 1899, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

39.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on June 1, 1889, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

38.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on December 2, 1888, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

37.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on June 1, 1888, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

36.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on December 2, 1887, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

35.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on June 1, 1887, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

34.

The Alabama & Chattanooga Railroad Company will pay forty nollars in coin to bearer at the treasury of the State of Alabama on Lecember 2, 1886, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

41

33.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on June 1, 1886, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

32.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on December 2, 1885, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

31.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on June 1, 1885, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

30.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Ala-
42 bama on December 2, 1884, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

29.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on June 1, 1884, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

28.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on December 2, 1883, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

27.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the Treasury of the State of Alabama on June 1, 1883, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

43 26.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on December 2, 1882, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

25.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on June 1, 1882, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

24.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on December 2, 1881, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

23.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on June 1, 1881, being six months' interest onl and bond No. 1999, for $1,000.

44 $40. D. W. STANTON, *Pres't.*

22.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on December 2, 1880, being six months' [interest] on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

21.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on on June 1, 1880, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

20.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on

December 2, 1879, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

19.

The Alabama & Chattanooga Railroad Company will pay
45 forty dollars in coin to bearer at the treasury of the State of Alabama on June 1, 1879, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON.

18.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on December 2, 1878, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

17.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on June 1, 1878, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

16.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on December 2, 1877, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

46 15.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on June 1, 1877, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

14.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on December 2, 1876, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

13.

The Alabama & Chattanooga Railroad Company will pay forty dollars in coin to bearer at the treasury of the State of Alabama on June 1, 1876, being six months' interest on land bond No. 1999, for $1,000.

$40. D. W. STANTON, *Pres't.*

EXHIBIT "C" to original bill.

This instrument of mortgage, made this second day of
47 March, in the year eighteen hundred and seventy, by and between the Alabama and Chattanooga Railroad Company, a corporation of the States of Alabama, Georgia, Mississippi, and Tennessee, the party of the first part, and the State of Alabama, the party of the second part, witnesseth: That whereas said State of Alabama, by an act entitled "An act to loan the credit of the State of Alabama to the Alabama and Chattanooga Railroad Company, for the purpose of expediting the construction of the railroad of said company within the State of Alabama," and approved February 11th, 1870, has granted certain aid to said corporation, and has in and by said act required the Governor of said State to issue bonds of said State to an amount not exceeding two millions of dollars in favor of said company, bearing interest a rate not — eight per cent. per annum, which said interest shall be payable semi-annually in currency or coin, and the bonds shall be payable at the expiration of not less than fifteen nor more than thirty years upon the terms and conditions in said act set forth; and whereas said act fur-
48 ther provides that the Governor of the said State shall only issue said bonds upon receiving in exchange therefor an equal amount of first-mortgage bonds of said railroad company, bearing the same rate of interest as the above-mentioned State bonds, and secured by a first mortgage upon the lands granted by the United States to said railroad company and upon any interest which said company now has or may hereafter lawfully acquire in or to said lands, with this reservation: That the said Alabama and Chattanooga Railroad Company shall have the privilege and right of selling said lands, or any part thereof, in accordance with the act of Congress granting the same: Provided, however, That the proceeds of said sale shall be appropriated to the payment of the aforesaid first-mortgage bonds of the said railroad company issued to the State: Provided, further, That the Governor shall require said railroad company, before issuing to said company said bonds, to give the State of Alabama a first mortgage on the telegraph line and tele-
graph offices along the line of said road belonging to said
49 company; also on the machine shops and other property in the State and in Georgia, Tennessee, and Mississippi belonging to said company; also on all coal mines now open or hereafter to be opened and worked belonging to said company; also upon all iron or other mineral lands and all iron manufacturing establishments now in operation or hereafter to be constructed; and whereas said Alabama and Chattanooga Railroad Company, in order to obtain said State aid, proposes to issue to said State bonds of said corporation, secured as is by said act required, and entitled first-mortgage land bonds of the Alabama and Chattanooga Railroad Company:

Now, therefore, the said Alabama and Chattanooga Railroad Company, in compliance with the terms and conditions of said act, and for the purpose of obtaining the aid thereby granted to this corpo-

ration, and in order to secure the punctual payment of said first-mortgage land bonds of this corporation, does thereby grant, bargain, sell, enfeoff, release, assign, and convey unto the State of Alabama, and its successors and assigns, forever, all lands
50 granted by the United States to and for the benefit of this company, and all the right, title, interest, and estate which said company now has or may hereafter lawfully acquire in or to said lands, subject to this reservation to said company, as by said act provided: That said company shall have the privilege and right of selling said lands, or any part thereof, in accordance with the act of Congress granting the same, and entitled "An act to renew certain grants of land to the State of Alabama," and approved April 10, 1869: Provided, however, That the proceeds of said sales shall be appropriated to the payment of the aforesaid first-mortgage land bonds of said company, to be issued to the State of Alabama as aforesaid; also the telegraph line and telegraph offices along the line of said road and belonging to said company; also the machine shops and all other property in said States of Alabama, Georgia, Tennessee, and Mississippi belonging to said company; also all coal mines now open, or hereafter to be opened and worked, belonging to said company, and all iron or other mineral lands, and all iron
51 manufacturing establishments now in operation or hereafter to be constructed, saving and excepting only from said granted premises such and so much of the same as said company may have heretofore conveyed in mortgage, or by either or both of two indentures of mortgage, both made on December 19th, 1868, and covering the railroad and certain other property of said company; for a more specific description whereof reference is hereby made to said two indentures, the same having been recorded in the counties where said road is located.

To have and to hold the said granted premises mentioned as aforesaid unto the said State of Alabama, its successors, and assigns to and for the only use, benefit, and behoof of said State, its successors and assigns forever. Provided, however, That if said company, its successors, or assigns shall well and duly pay or cause to be paid to the State of Alabama, its successors, or assigns any and all of the above mentioned first-mortgage land bonds of said company issued to said State as above provided, and all coupons or interest warrants issued with and belonging to the same when and as the same
52 shall respectively fall due, then this deed shall be null and void, otherwise to remain in full force and effect.

In witness whereof the said Alabama and Chattanooga Railroad Company has caused its corporate seal to be hereto affixed and these

presents to be executed on its behalf, by Daniel W. Stanton, its president, on the day and year first above named (in twelve months).

[Alabama and Chattanooga Railroad Co. seal.]

ALABAMA AND CHATTANOOGA
RAILROAD COMPANY.
By D. W. STANTON, *Pres't.*

Executed in presence of—
R. T. PAINE, Jr.
JAS. B. BELL.

JAS. B. BELL,
Notary Public & Commissioner for all the States and Territories, No. 12 Old State-House, Head of State St., Boston, M's.

COMMONWEALTH OF MASSACHUSETTS, } ss:
County of Suffolk, City of Boston, }

Be it remembered that on the fourteenth day of March, in the year of our Lord one thousand eight hundred and seventy, before me, James B. Bell, a commissioner in and for the city of Boston, county of Suffolk, and commonwealth of Massachusetts, residing in said city, duly commissioned and authorized by the Governor
53 and qualified under laws of the States of Alabama, Georgia, Mississippi, and Tennessee, to take the acknowledgement and proof of the execution of deeds and other instruments in writing, under seal or not, to be used or recorded in said States of Alabama, Georgia, Mississippi, and Tennessee, and to take depositions, to administer oaths and affirmations, &c., I hereby certify personally appeared Daniel W. Stanton, president of the Alabama and Chattanooga Railroad Company, whose —, as said president, is signed to the annexed indenture of mortgage, with whom I am personally acquainted, *that*, being informed of the contents of the said annexed indenture of mortgage and being by me duly sworn, deposed and said that he was personally present at the execution of the annexed instrument of mortgage on the day the same bears date and saw the common seal of said Alabama and Chattanooga Railroad Company duly affixed thereto, and that the seal so affixed is the common and corporate seal of said Alabama and Chattanooga Railroad Company, and that the annexed indenture of mortgage was duly signed,
54 sealed, and delivered by them by order of the board of directors of the said Alabama and Chattanooga Railroad Company as — for the act and deed of the said Alabama and Chattanooga Railroad Company for the uses and purposes therein contained; and his name is subscribed to the said annexed indenture of mortgage as the president of said company in attestation of the due execution and delivery of said indenture, and is of his own proper handwriting.

In witness whereof I have hereunto set my hand and official seal as commissioner of the States of Alabama, Georgia, Mississippi, and

Tennessee, at my office in the city and Commonwealth aforesaid, on the day and year above written.

[Jas. B. Bell, Commissioner, Boston, Mass.]

JAS. B. BELL,
Commissioner for the States of Alabama, Georgia, Mississippi, and Tennessee.

STATE OF TENNESSEE, *Hamilton County:*

REGISTER'S OFFICE.

March 24, 1879, at 5½ o'clock p. m., then was the foregoing indenture of mortgage, with its certificates, received for registration, and is now of record in book S, pages 491, 492, 493, 494, 495.

JOHN F. HAMILL, *Register.*

55 STATE OF TENNESSEE, } ss:
Hamilton County, }

I, H. C. Beck, register of said county, do hereby certify that the foregoing seven pages and 23 lines contain a full, true, and correct copy of a mortgage, together with the certificates of probate and registration thereof made by the Alabama and Chattanooga Railroad Company to the State of Alabama as the same remains of record in my office.

Witness my hand this 10th day of April, 1882, at office, in Chattanooga, Tenn.

H. C. BECK, *Register.*

Endorsed: "Filed 28th May, 1883." T. M. McConnell, C. & M., by J. B. Rayon, D. C. & M.

EXHIBIT "D" to original bill.

No. 38.) (S. B., 302.

An act to ratify and confirm the settlement of the existing indebtedness of the State, as proposed in the report of the commissioners appointed under the act approved 17th December, 1874, and which was communicated to the General Assembly by message of the Governor of 24th January, 1876, and to carry said settlement into effect by the issuance of new bonds of this State at a reduced
56 rate of interest in adjustment of a portion of said indebtedness, and the surrender of certain securities held by the State in discharge of another portion of said indebtedness.

Preambles.

Whereas the State of Alabama is indebted to sundry parties, the holders of bonds heretofore issued by it, and certain claims are alleged against it by reason of certain indorsements of other bonds by this State, issued by the Alabama and Chattanooga Railroad Company, and also for money loaned to the State, constituting the indebtedness of the State existing on the 6th day of December, 1875, and upon which a large arrearage of interest remains unpaid, and which it is the interest alike of the said State and of the holders thereof to adjust in such manner that no question of dispute may

hereafter exist and no default in payment of future accruing interest may occur;

And whereas a scheme for adjustment thereof has been
57 considered on the part of this State by commissioners appointed under the act approved 17th of December, 1874, entitled "An act for the appointment of commissioners to liquidate and adjust all claims against the State of Alabama arising from bonds issued or indorsed in the name of the State," and the same has been accepted by a large proportion of the holders of such claims, and is now recommended by the said commissioners to be adopted by the State; all of which appears in the report of said commissioners, which was communicated to the General Assembly by the message of the Governor, dated January 24th, 1876; and whereas said adjustment is such as the State may wisely accept and ratify as a settlement of its liabilities growing out of bonds heretofore issued by and indorsed in the name of the State, as presented in said report of said commissioners, and as will do justice between the State and the holders of the several claims hereinafter named, therefor—

SECTION 1. Be it enacted by the General
58 Plan of settlement of commisioners approved. Assembly of Alabama, That the provisional plan of settlement of the existing indebtedness of this State, as proposed by the report of the commissioners appointed under the act named in the preamble to this act, and communicated to the General Assembly by the message of the Governor under date of January 24th, 1876, be, and the same is hereby, approved and accepted, and to carry the same into effect the Governor of this State is hereby authorized and empowered to cause

Authority of Governor. to be prepared bonds of the State of Alabama to an amount not exceeding in the aggregate seven millions of dollars. Said bonds shall bear date the first day of July, 1876, and shall be payable thirty years after their date, in the city of New York, in lawful money of the United States. They shall bear interest at the rate of two per cent. per annum for the first five years after their said date, three per cent. per annum for the

Rate of interest, second five years thereafter, four per cent. per annum for the next succeeding ten years, and thereafter five per cent. per annum until their maturity.

Said bonds shall, on their face, be made renewable at
59 the pleasure of the State, with interest thereon at the rate of five per cent. per annum. The interest

How payable. upon said bonds shall be payable semi-annually in lawful money of the United States, in the city of New York, on the first days of January and July in each year during the running of said bonds. Said

Coupons attached. bonds shall be issued with coupons attached, expressing the amount and time of payment of the said respective installments of interest as the same shall accrue thereon. Said bonds shall each be for

Denomination of bonds. the sum of five hundred or one thousand dollars, and shall be numbered from number one

to the highest number which will be required to make in the aggregate the amount in this section named; they shall be signed by the Governor and countersigned by the auditor of this State; and the interest coupon shall bear the signature of the treasurer of the State. Said bonds shall be issued under the great seal of the State, and said bonds shall be designated as class "A," and shall, on their face, show that they are issued under authority of this act, the title and date whereof shall be thereon recited. Said bonds, however, shall not be held or taken as complete obligations of the State until they are respectively authenticated by the signature of at least one of the commissioners appointed by the Governor, under the said act approved 17th of December, 1874, and before said bonds are delivered to the commissioners, as hereinafter directed, a full registry thereof shall be made in a well-bound book to be procured for that purpose, which shall be deposited in the office of the auditor of the State: Provided, That for the purpose of making suitable able exchanges and payment- as hereinafter provided, a limited number of bonds for a less sum each than five hundred dollars may be issued to conform, however, in all other respects with the provisions of this section.

Signed by Governor and countersigned by auditor.

Disignated as class "A."

60

Registry of the bonds before delivery.

SECTION 2. Be it further enacted, That when said bonds shall have been prepared for the signature of the officer herein directed to sign the same, it shall be the duty of said commissioners, under said act of December 17th, 1874, by advertisement inserted for one week in one newspaper published in each of the cities of New York and London, to give notice of the time and place in the city of New York when and where the exchange and substitution of bonds authorized in this act will be made: Provided, That from and after the 31st day of October, 1876, no further exchange and substitution of any bonds will be made except at the office of the treasurer of the State, in the city of Montgomery: And provided further, That the exchange and substitution of bonds issued under this act for the bonds issued under the act entitled "An act to relieve and regulate the finances of the State," approved December 15th, 1871, and the act entitled "An act to maintain the credit of Alabama," approved February 25th, 1873, shall be made only in the city of Montgomery, at the office of the commissioners appointed under said act of the 17th December, 1874.

Notice of time and place of exchange.

61

No exchange after October, 1876, except at the treasurer's office.

Exchange of certain bonds only at Montgomeey.

SEC. 3. Be it further enacted, That when the bonds herein authorized are fully exe-

Bonds executed de-

livered to com'rs by sec. of State.

cuted, excepting the certificate of the commissioners herein required, the same must be delivered by the secretary of State to said
62 commissioners appointed under said act of the 17th of December, 1874, who shall certify to the correctness of the registry thereof hereinbefore required, and shall execute to the treasurer of the State receipt therefor, describing the bonds so received by them; said receipt shall be filed in the office of the treasurer, and said commissioners shall then proceed to use and apply the bonds hereinbefore authorized in exchange for and substitution of the bonds and obligations, and in payment and discharge of the debts and liabilities as hereafter specified.

Commissioners rec't to treasurer for bonds.

SEC. 4. Be it further enacted, That it shall be, and is hereby made, the duty of the commissioners appointed under the act of 17th of December, 1874, to use the bonds by the first section of this act authorized in exchange and substitution of the bonds of this State heretofore issued and now outstanding under authority of the following named acts, that is to say: "An act entitled an act to provide for the issue of State bonds," approved 15th of December, 1865;
63 "An act to renew and extend the time of payment of certain bonds therein named," approved 18th of January, 1866; "An act entitled an act to provide for the payment of interest on the bonded debt of the State of Alabama," approved 13th of February, 1866; "An act entitled an act to renew and extend the time of payment of certain bonds therein named," approved 6th of February, 1867; "An act entitled an act to authorize the issue of State bonds," approved 12th of August, 1868; "An act entitled an act to provide for the extension of certain State bonds due and payable in London on the first day of June, 1870," approved 17th February, 1870; "An act entitled an act to relieve and regulate the finances of this State," approved 15th of December, 1871; "An act entitled an act in relation to the State bonds of Alabama," approved 19th of February, 1872; "An act — an act to maintain the credit of Alabama," approved 25th of February, 1873; but such exchange and substitution shall be made in such manner that said bonds herein authorized shall be given only for the amount of the principal sum expressed on the face of the bonds issued under the acts in this section named without allowing any interest thereon;
64 and only upon the delivery to said commissioners of bonds now outstanding, issued and sold in accordance with the provision of the said named acts, with all the interest coupons thereto belonging, whether attached or not, and whether passed due at the time of exchanged or still to mature; and if such exchange be made after the time for the payment of any interest coupon attached to the bonds herein authorized shall have elapsed, then such matured coupon or coupons shall be detached from said bonds so as to be

Duty and authority of commissioners.

Bonds to be exchanged for princip'l of the face of bonds issued under acts recited in this section.

given in exchange and be retained by the commissioners, to be accounted for by them in the settlement hereinafter directed to be made by them with the auditor of the State.

Bonds issued under 1st section of this act applied to payment of claims recited in this section.

SEC. 5. Be it further enacted, That the said commissioners shall also use and apply so many of said bonds issued under authority of the first section of this act as may be necessary in payment of the following named claims against the State, that is to say:

65 First. In exchange for one hundred and thirty bonds of one thousand dollars each, known as the short bonds, sold by Gov. Lindsay under authority of an act of this State, approved March 8, 1871.

Second. In exchange for twenty-eight bonds, of one thousand dollars each, remaining outstanding of one hundred and thirty bonds issued by Gov. Lewis to the New York Guaranty & Indemnity Company, of the issues of 1873.

Third. One hundred and forty-three bonds, of one thousand dollars each, used by *by* Gov. Lewis in payment for the Alabama & Chattanooga railroad, under decree of the United States district court for the middle district of Alabama, of the issues of 1873.

Fourth. The balance due on the 1st of January, 1875, to the New York Guaranty & Indemnity Company, which is believed to be the sum of about sixty-seven thousand dollars, and which balance said commissioners are hereby authorized to ascertain and adjust.

66 Fifth. The balance due Messrs. Duncan, Sherman & Co., or their assignees, which is believed to be the sum of thirty-three thousand dollars, and which balance said commissioners are hereby authorized to ascertain and adjust.

Sixth. The balance due the assignee in bankruptcy of the Alabama and Chattanooga Railroad Company, which is believed to be the sum of sixty-six thousand dollars, and which balance said commissioners are authorized to ascertain and adjust, unless said claim be sooner settled and discharged from the current revenue of the State, and by the use of obligations which may be in the treasury, issued under authority of the act approved December 19, 1873, entitled "An act to provide for the funding of the domestic debt of this State," and which settlement said commissioners are hereby empowered to make.

Seventh. And also in exchange for the bonds of this State heretofore issued under authority of an act approved 9th

67 of February, 1852, entitled "An act to renew and extend the time of payment of certain State bonds therein named, falling due in 1872," and which have not heretofore been renewed or extended, but still remain due and unpaid, of which issue the sum of twenty-one thousand dollars has been reported to the commissioners as outstanding; but such exchange must be made upon the same terms and conditions as are mentioned in the fourth (4th) section of this act, and applied to the bonds therein named.

SEC. 6. Be it further enacted, That the Governor of this State be,

and he is hereby, authorized and empowered to cause to be prepared a further series of bonds of the State of Alabama, to be designated Class "B," and numbered from number one to the highest number which will be required to make in the aggregate the amount of five hundred and ninety-six thousand dollars, which shall be the total amount of bonds to be issued under authority of this section. Said bonds authorized by this section may be made to bear a rate of interest not exceeding five per cent. per annum, payable semi-annually. In all other respects than mentioned in this section said bonds, in their mode of issue, execution, and registry, shall conform to the requirements mentioned in the first section of this act. But the exchange of these bonds, hereinafter authorized, must be made at the office of the treasurer of this State, in the city of Montgomery.

Other bonds designated Class B.

Rate of interest.

Exchanged at treasurer's office in Montgomery.

SEC. 7. Be it further enacted, That said commissioners are also authorized and empowered to use and apply so many of said bonds authorized by section six of this act as may be necessary for that purpose in exchange for and substitution of the bonds of this State heretofore issued under authority of an act approved 21st of April, 1873, entitled "An act to provide for the substitution of State bonds to the amount of four thousand dollars per mile in lieu of State indorsements of bonds of the various railroad companies of this State," but in such manner that one bond of the issue herein authorized shall be substituted and exchanged for two bonds of the issue authorized by said act of 21st of April, 1873, and in making such exchange no allowance shall be made for interest upon the last-named bonds, but two of said bonds, with all the coupons thereto belonging, whether attached or not, and whether due or to mature, shall be surrendered for each and every bond of the issue authorized by section six of this act, which may be applied under the authority of this section; all other conditions declared in section 4 of this act, in relation to exchanges under that section, shall also apply and be observed in relation to the exchange, and substitution authorized to be made under this section, it being understood and declared that the unpaid taxes are due prior to the first of October, 1875, by the several railroad companies, to and for which the said bonds authorized under said act of 21st of April, 1873, were issued, and the interest upon the said bonds so issued, and which are hereby authorized to be received in exchange for the bonds authorized by the next preceding section of this act, shall be taken to set off and discharge and satisfy the one the other.

Bonds of Class B may be exchanged for bonds issued under act of April 21, 1873.

Terms of exchange.

SEC. 8. Be it further enacted, That said commissioners be, and they are hereby, authorized to use and apply so many of the bonds hereinbefore by

Authority of com-

m'rs to use bonds issued under 1st sec. of this act to liquidate liability mentioned in this section.

the first section of this act authorized as may be necessary for that purpose to pay off and discharge the just amount of every indebtedness which, on a fair and proper counting (and which said commissioners are hereby authorized to make), may be established against this State by reason of transactions and dealings heretofore had between it and the firm of Henry Clews & Co., of New York, not to exceed the sum of three hundred and ten thousand dollars, and interest, and when said amount is so ascertained said commissioners are authorized to apply the said bonds in exchange for the six hundred and fifty bonds of one thousand dollars each, of the issues of 1872 and 1873, and under the acts mentioned in the fourth section of this act, and placed in the possession of said Henry Clews & Co., as security for advances to this State by said firm, in such manner that said new bonds shall be distributed among the bondholders of said six hundred and fifty bonds in the proportion in
71 which they respectively hold said last-named bonds, and in exchange for said bonds so held by them.

Exchange at Montgomery.

The exchange contemplated in this section shall be made only in the city of Montgomery, at the office of the commissioners, appointed under said act of 17th of December, 1874, and only upon the delivery to said commissioners of the said bonds now outstanding and held by said holders thereof, respectively, with all the interest coupons thereto belonging whether attached or not, and whether past due or to mature. And it is

Certain claims declared invalid.

hereby declared that all other claims and evidences of debt alleged against this State other than the new bonds, by this section authorized to be exchanged, for said six hundred and fifty bonds arising out of the dealings and transactions between this State and said Henry Clews & Co., and which are mentioned in this section and the report of the commissioners referred to in the preamble of this act, shall thereafter be and forever remain invalid and void as against this State and of no force and effect whatever.

72 SEC. 9. Be it further enacted, That the Governor of this State be, and he is hereby, authorized and

Bonds of Class C, nnmbered 1 to 1000, of a thousand dollars each.

empowered to cause to be prepared a further series of bonds of the State of Alabama, to be designated as Class C, and numbered from number one to number one thousand. Each of said bonds shall be for the sum of one thousand dollars, and the total amount thereof shall be one million of dollars. Said bonds shall be dated the 1st day of January, 1876, and shall bear interest from that date for the first five years from their date at the rate of two per cent. per annum, thereafter at the rate of four per cent. per annum, payable semi-annually on the first day of July and January in each year during the time for which said bonds are to run. Said bonds shall be made payable thirty years after their date, and be renewable at the pleasure of the State for another

period of thirty years, but during that extended period shall bear interest at the rate of five per cent.

Payable in lawful money of United States.

Principal and interest of said bonds shall be payable in lawful money of the United States, in the city of New York.

73 In all respects, other than mentioned in this section, said bonds in their mode of issue, execution, registry, shall conform to the requirements mentioned in the first section of this act, except that the certificate therein required to be made upon said bonds by at least one of the commissioners, if the exchange hereinafter provided for be made in London, may be made upon said bonds by the agent who may be appointed to make said exchanges in that city, whether he be one of said commissioners or not.

Said bonds issued only in extinguishment of 1st mortgage-endorsed bonds of A. & C. R. R.

SEC. 10. Be it further enacted, That said commissioners under said act of 17th of December, 1874, are authorized and empowered to use and apply said bonds which are authorized by the ninth section of this act only in retirement and exchange and extinguishment of the first-mortgage endorsed bonds of the Alabama and Chattanooga Railroad Company, which bear date in 1869, and and were issued, endorsed, and disposed of in pursuance of and in accordance with the terms, requirements, and conditions of

74 the following named statutes of this State; that is to say, an act approved February 19, 1867, entitled "An act to establish a system of internal improvements in the State of Alabama," an act approved September 22, 1868, entitled "An act to amend the law to establish a system of internal improvements in the State of Alabama," and an act approved September 17th, 1868, entitled "An act relating to the Wills Valley Railroad Company and the Northeast and Southwest Alabama Railroad Company."

Exchanges how made.

SEC. 11. Be it further enacted, That the exchange authorized in the next preceding section shall be made in the city of London, or in the city of New York, as the holders of the bonds authorized by said preceding section to be received in exchange may elect; but such election must be certified to the Governor of this State within six months after the passage of this act, or he may select at which of said cities such exchange shall be made.

75 Such exchange as may be made at London shall be effected under the superintendence, jointly, of an agent to be appointed by the Governor of this State and at the expense of this State, and an agent to be appointed by the council of the corporation of foreign bondholders, which is a corporation established in said city of London, and at its expense. But the expense of printing and preparing for exchange [of] the bonds authorized by the ninth section of this act shall be paid by this State.

Exchange of bonds under 10 sec. of this act discharges the

SEC. 12. Be it further enacted, That the exchange of said bonds, which is authorized by the tenth section of this act, shall be made in such manner that the said million of dollars

State from liability on account of A. & C. R. R. bonds.

principal expressed on the face of the said thousand bonds shall be in full payment and discharge of this State of all liability, claim, & demand whatsover against it of, upon, and by reason of said bonds described in the tenth section of this act, so that from and after the issue of said one thousand new bonds this State shall and will forever be and remain fully, completely, and entirely freed and discharged of all liability, claim, and de-
76 mand for principal and interest, and any portion of either, by any person or persons, corporation or corporations whatever, for or on account of any endorsement by any officer or agent of the State, or any person acting in its name, on or upon any, every, and all bonds made or issued by the said Alabama and Chattanooga Railroad Company bearing the endorsement thereon of this State or in its name.

Said exchange shall be made in such manner that the bonds by the ninth section of this act authorized shall be distributed among and to the several holders of the bonds described in the tenth section of this act in the proportion, respectively, which the amount held respectively by said owners, including interest from first day of January, 1872, bears to the aggregate, composed of the principal of all the bonds described in said section and the interest thereon due and unpaid to the 1st day of January, 1876; but no portion of the bonds described in the ninth section of this act shall be delivered by said commissioners or by any agent appointed to make the exchangein this act
77 directed, unless the bonds themselves herein authorized to be received, and which are described in the tenth section of this act, be surrendered to said commissioners or agents, and the unpaid coupons respectively, whether attached to said bonds or not, and whether past due or to mature. But if any of said bonds or coupons, or bonds and coupons in this section directed to be surrendered to said commissioners or agents before issued to the holders thereof of these new bonds, shall have been used in payment of any purchase of the property of said Alabama and Chattanooga Railroad Company under the decree of foreclosure and sale of the same by the circuit court of the United States for the fifth judicial circuit, at Mobile, by the holders thereof, and the same have been cancelled by order of said court and remain deposited therein as a part of its records, as to them the certificate of the clerk of said court, under the seal thereof, specifying the descriptions, numbers, and amount of said bonds and coupons, or bonds or coupons, so paid and cancelled, shall be received by said commissioners
78 or agent, and regarded the same as if the bonds and coupons in said certificate described were then and to them surrendered; and such certificates so received shall be returned by said commissioners, with certificate by them or the agent to exchange endorsed thereon of the facts attending the receipt by them or him of said certificate by said clerk of the said circuit court.

Bonds and unpaid coupons must be delivered up before comm'rs are authorized to exchange.

SEC. 13. Be it further enacted, That in consideration of the interest upon the bonds authorized by the ninth section of this act, being for the fourth and fifth years after their date, placed at two per cent all past taxes due upon the property of said railroad company for the years preceding the first day of October, 1875, are hereby released to the purchasers of said railroad property, and the persons or corporation deriving title under them, if said purchasers be the holders of the first-mortgage bonds of said railroad company; but if such purchasers be not the holders of such bonds, then the release of past taxes in this section declared shall not obtain, and the rate of interest upon said bonds in the ninth section authorized shall be three per cent. for said fourth and fifth years, and not two per cent., as hereinbefore declared: Provided, That during the fiscal year now current, and hereafter, the said railroad and property owned and used in this State by the said Alabama and Chattanooga Railroad Company and its successor or successors by whatever name, title, or description it or they may be known or designated, shall be subject to taxation by this State in the same manner and to the same extent and at the same rates as other property in this State of a like character owned or used by other railroad companies, associations, or corporations: And provided further, That the rates of charges for freight and passenger traffic over and upon the said railroad within the State of Alabama and the regulation of its business shall be subject to the same legislation by this State as may now be in force or may hereafter be enacted upon the same subjects in relation to other railroads in this State, and all laws exacted for the benefit of any other railroad companies within this State upon these subjects or which shall confer larger rights upon such other company shall at once apply to said Alabama and Chattanooga Railroad Company, its successor or successors, described in this section without further mention thereof.

Past due taxes released.

79

80

SEC. 14. Be it further enacted, That the lien or liens upon the road and other property of the said Alabama and Chattanooga Railroad Company which has or may have been heretofore created in favor of this State by any act of the General Assembly heretofore enacted, or by any contract, deed, or agreement by the said railroad company heretofore made for the benefit, protection, or indemnity of this State by reason of any endorsement of any of the bonds of said railroad company is not hereby or in any manner extinguished or released, but the same are hereby declared to be and shall continue in full force for the protection and benefit of the holders of the bonds and coupons of said railroad company described in the tenth section of this act who may come in and surrender their said bonds and coupons in exchange for the new bonds of this State by the ninth section of this act authorized to be issued, and for the protection of the title which said holders or any of them may acquire by purchase of the property and franchises of said Alabama and Chattanooga Railroad Company at the judicial

State liens to remain in full force.

81

sale hereinbefore mentioned and for the benefit and protection of all persons deriving title under such purchasers.

Governor authorized upon conditions to all right, title, &c., of State.

To carry the provisions of this section into full effect the Governor of this State is hereby authorized, in the name of this State and for it, to execute and deliver to such holders of said bonds and coupons as may be entitled thereto under the provisions of this act, or to any trustee by a majority of them, in number or value, to be designated for that purpose, and for the use and benefit of said parties, a full assignment of all rights, titles, powers, and liens of every description, whether existing by any former statute or continued by this statute or otherwise and now possessed by the State or Governor upon the property embraced in the mortgage known as the
82 first mortgage, dated 19th December, 1868, and which was given by said Alabama and Chattanooga Railroad Company to secure the bonds in the tenth section of this act described, and thereby and thereafter said assignees shall be clothed for their own use and protection, but for the benefit of the parties hereinbefore named, with all said rights, titles, powers, and liens, as fully as the State is concerned, such assignment shall operate as a mere release by the State and shall impart no manner of obligation upon the State as to the validity, value, or effect of such right, titles, powers, and lien or liens so intended to be assigned, but from all liability of any kind thereunder this State is and shall be fully and forever discharged:

Assignment operates a release by State, and imports no obligation as to validity of such right, title, &c.

Proviso.

Provided, That said release and assignment shall not extend to the right of this State under the act of 11th of February, 1870, entitled "An act to demand the creation of a sinking fund" from the revenues and income of said railroad company, unless and until the terms of sale of the property of said railroad company as directed by decree of
83 the circuit court of the United States, hereinbefore mentioned, of the 23rd of January, 1874, and the 15th of January, 1876, shall have been fully complied with by the purchasers at said sale, being holders of first mortgage bonds of said Alabama and Chattanooga Railroad Company, as hereinbefore described, and actual possession of the property so purchased by such bondholders has in fact been acquired by them, or by their agents by them duly constituted and appointed.

As a full discharge of liability on account of the two million direct bonds the State releases its lien on all property by reason of any mortgage, &c., executed to or for use

SEC. 15. Be it further enacted, That as the direct bonds heretofore issued by this State to the Alabama and Chattanooga Railroad Company, which amount in their aggregate principal to the sum of two millions of dollars, and which were issued under authority of an act approved 11th February, 1870, entitled "An act to loan the credit of the State of Alabama to the Alabama and Chattanooga

of State by A. & C. R. R. Co.

Railroad Company for the purpose of expediting the construction of the railroad of said company within the State of Alabama," and also the unpaid interest thereon, including the installment of
84 interest falling due the 1st day of January, 1876, and in full discharge and satisfaction of all liability of any kind thereon, past, present or present or future; it is hereby declared by the State of Alabama that it will, and hereby does, release to the holders of said bonds all the lien and right the State now has or is entitled to, in, or upon all property of every kind by reason of any mortgage or security or deed or conveyance of any kind which has heretofore been made or executed to or for the use of this State by the said Alabama and Chattanooga Railroad Company for the indemnity, protection, and security of the State against payment, loss, or injury by reason of its execution of its bonds in this section mentioned; but this release by the State and conveyance of its said rights and liens is upon the condition and only to become operative and to go into effect upon the return and delivery to the Governor of this State or such agent or agents as he may appoint for that purpose of the bonds in this section before described, and the coupons for interest belonging or attached thereto, and as said bonds and coupons
85 shall be so returned and delivered. And it is further declared that upon the execution in behalf of this State of the deed of conveyance in trust as hereinafter provided, all liability of the State upon said bonds and coupons in this section mentioned shall cease and thereafter forever remain discharged and wholly extinguished.

Right of sinking fund shall be assigned on certain conditions.

SEC. 16. Be it further enacted, That the right of the sinking fund which is required by said act of 11th February, 1870, to be set apart by the said Alabama and Chattanooga Railroad Company from its revenues and income for the use and benefit of this State, and its protection and indemnity, shall also be assigned by this State for the benefit of the holders of the bonds mentioned in the preceding section; but the right to such sinking fund shall cease and determine whenever and so soon as the holders of the first mortgage bonds of the said Alabama and Chattanooga Railroad Company, by themselves or their agents shall have fully complied with the terms of sale of the
86 property of said company, according to the decrees and orders of the circuit court of the United States for the fifth judicial circuit, sitting at Mobile, in the suit therein pending for the foreclosure of the said first mortgage of the said railroad company, and shall have acquired actual possession of said property, as is provided in the fourteenth section of this act.

Lands acquired under 15th section of this act exempt from tax for 8 years.

SEC. 17. Be it further enacted, That the lands which may be acquired by the holders of the bonds mentioned in the fifteenth section of this act, or by the trustees hereinafter provided, for the use of said bondholders under the terms of this act, shall remain exempt from taxation by

this State for the term of eight years from the first day of May, 1876; and in all proceedings which said bondholders or said trustees may deem necessary to assert their title to said bonds, or any part thereof, against fraudulent or fictitious sales or conveyances, the said trustees may, if so advised by counsel learned in the law, use the name of the State, but always indemnifying the said State against costs and expense in all such proceedings.

87 SEC. 18. Be it further enacted, That the deed of trust and assignment hereinafter provided for the benefit of the holders of said bonds, mentioned in section fifteen of this act, shall, so far as liability upon the State is concerned, operate and have effect only as a release and quit-claim on the part of the State, and shall import no warranty or guaranty, or create any liability on the part of the State of any name or kind whatsoever, though it shall operate a positive, full, and absolute conveyance of the right and title of the State to all the property and choses in action herein and hereby authorized to be assigned, transferred, and conveyed to such trustees for the use and benefit of said holders of said bonds.

Authority of Governor to carry into effect provisions of certain sections.

SEC. 19. Be it further enacted, That to carry into effect the provisions of sections fifteen, sixteen, and seventeen of this act, the Governor of this State be, and he is hereby, authorized and empowered by deed, in the name and under the great seal of this State, to assign, transfer, and convey the property and rights herein named to two persons,

88 one of whom shall be appointed by himself, and the other shall be appointed by a majority in number and value of such of the said bondholders as by the first day of May, 1876, have signified in writing to the governor their intent to surrender their said bonds to the Governor under the terms of this act. Vacancies in the said trusteeship shall be filled by the said Governor or said bondholders as may then have surrendered their bonds, as the case may be, in the manner provided for the original appointment of said trustees. The property and rights so to be conveyed and assigned are the bonds issued by the said Alabama and Chattanooga Railroad Company to the Governor of this State in exchange for the bonds of the State of Alabama, mentioned in the fifteenth section of this act; the deed of mortgage executed by said Alabama and Chattanooga Railroad Company to the State of Alabama, dated second of March, 1870, to secure the payment of said bonds so issued by said railroad company, as required by said act of 11th of Feb-

89 ruary, 1870, all the right, title, and interest which this State has or is entitled to in the lands and property described in said deed of mortgage last named, executed by said railroad company:

Description of rights and property conveyed.

All right, title, estate, and interest acquired by said State in the lands and property mentioned and described in said mortgage at the purchase under decree of the district court of the United States for the middle district of Alabama in the matter

of the bankruptcy of the Alabama & Chattanooga Railroad Company;

All the right, title, and interest which this State has in or upon or to the telegraph lines and telegraph offices and instruments and on the machine shops and machinery and all coal mines and iron and mineral lands and iron and manufacturing establishments and all or any other property in said statute of 11th of February, 1870, referred to by operation of said statute or by any deed or conveyance or contract made by said railroad company for the indemnity and protection of this State;

All money yet unpaid by purchasers of any parts, parcels, or portions of the said lands embraced in said mortgage to this
90 State by said railroad company, and which have been sold by said railroad company under the authority reserved to it in said act of the 11th of February, 1870; but the title of all *bona fide* purchasers of any portion of said lands acquired under said authority is hereby confirmed;

Any and all sums of money and securities remaining in the hands or possession of any person or persons, corporation or corporations, the proceeds of any lands — part of said mortgaged property, which may have been sold under the authority reserved as aforesaid, and have not been accounted for and paid into the treasury of this State as required by said act of 11th of February, 1879;

All the right, title, and interest which this State has in or to any part of the land embraced within the conflicting or overlapping limits of lands granted by the acts of Congress for the benefit of railroads in this State, and which, on partition heretofore made or hereafter to be made by agreement or otherwise, shall be assigned
91 or conveyed to said Alabama and Chattanooga Railroad Company, or its assignees, as the part belonging to said railroad company under said grants by Congress, and is or may be embraced in any conveyance to this State by said railroad company or covered by any liens held by this State by any statute or by any contract or agreement made by said railroad company for the benefit of this State: Provided, Nothing herein contained shall convey or give any right to said trustees or the holders of said bonds in any lands held by this State under said acts of Congress as trustee for the construction of any railroad the beneficial interest wherein is not held by this State;

All right of this State upon or against said railroad company for the creation and preservation of a sinking fund and the payment into the treasury of the proceeds thereof, subject, however, to the conditions contained in the sixteenth section of this act.

Condition of conveyance.

The conditions of the said conveyance and assignment herein directed to be made and the duties which said trustees are required to perform shall be that said trustees shall
92 receive and apply said property and rights for the use and benefit of the holders of the said bonds mentioned in the fifteenth section of this act who may accept the terms of this act in relation thereto and surrender their bonds as herein provided.

Said trustees shall proceed and collect all the choses in action hereby authorized to be assigned, and shall proceed and sell all the other property hereby authorized to be conveyed, and after paying into the treasury of this State ten per cent. of the net proceeds of the sales of all said lands so made by them, having first deducted the reasonable expenses incurred in executing the trust thereof, till the whole amount of interest heretofore paid by this State upon the said bonds in the fifteenth section described shall be reimbursed to the State, shall distribute the proceeds of all collections and sales so made by them among the holders of said bonds in proportion to their respective interest therein.

Said trustees shall have the power to sue for and recover
93 for the purposes aforesaid all choses in action and claims and demands of all kinds herein authorized to be conveyed, and to sue for and recover all lots and parcels of land, part of the lands hereby authorized to be conveyed, which have been obtained and are now held under fraudulent and fictitious sales and conveyances and for this purpose, if need be, may use the name of the State, but always at their own cost and charge; but where sales of said lands, or any portion thereof, have heretofore been made to purchasers in good faith, under the authority reserved to said railroad company, as hereinbefore stated, such trustees shall make title thereto, where not already made, but shall collect the purchase-money therefore when not already paid, and all sums, part of said purchase-money, remaining unpaid, and be entitled to all the securities thereof.

Said sales of land may be made from time to time, as may be found expedient, and in the manner most beneficial to said bondholders, and said trustees may make title thereto to all persons and corporations, purchasers who may be permitted by the con-
94 stitution of this State to hold lands therein, till the whole of said lands are sold.

All moneys realized from said trust property shall be distributed so that all holders of said bonds, who may have surrendered the same to the Governor, or as herein directed, shall receive their proportionate share thereof, but the residue shall be retained by said trustees, and be distributed to the several holders of bonds in their respective proportions, only when they shall surrender their said bonds, as herein provided; but the trust herein authorized to be created shall be closed at the end of ten years from the 1st of May, 1876, after which date all bonds described in the fifteenth section of this act, not then presented and surrendered, shall become barred of all right to participate in the benefits of the trust, or share in the proceeds thereof, and shall have no claim against this State, and all money then in the hands or possession of said trustee, part of said trust estate, shall be distributed *pro rata* among the holders of said bonds, who shall have surrendered the same; and all lands
95 then remaining unsold shall be conveyed by said trustees to such persons so entitled to share in said trust moneys, or to such person or persons as they may direct.

The said bonds and mortgages of said railroad company, herein

directed to be assigned to said trustees, shall be by them held to protect the title of said trustees and the rights of those beneficially interested therein, and shall not, by this assignment, be held to be extinguished or in any manner impaired, but shall remain an existing security for the purpose aforesaid. The Governor shall receive all bonds of the issue described in the fifteenth section of this act, which may be presented to him for surrender, and, after making a proper registry thereof, cause the same to be cancelled by appropriate stamps on their face, or by other device for that purpose, and shall cause them to be destroyed as hereinbefore prescribed for the registration and hereinafter directed for the destruction of other bonds by this act aurhorized to be retired and destroyed. Said trustees, for their services, shall be paid such commission upon the proceeds of collections and sales as the majority in number and
96 value of the bondholders as shall have surrendered their bonds may determine. They must give notice of their appointment, and of the terms of this trust, at least four times in each year, by advertising in the London Times newspaper and one daily newspaper in the city of New York.

Bonds, &c., to be cancelled.

SEC. 20. Be it further enacted, That said commissioners, upon the receipt of any and all bonds and notes and evidences of debt of any kind against the State, under the provisions of this act, shall cause them to be forthwith cancelled, or so defaced or mutilated as to destroy their negotiability, and, after accurate descriptions shall have been made thereof in a suitable book, to be preserved in the office of the treasurer, shall cause said bonds, notes, and evidences of debt to be burned in the presence of the secretary of State and attorney general, who shall make and sign a certificate thereof, to be entered in the book in this section named. Said commissioners shall also, in like manner, cause accurate description to be made of all bonds, notes,
97 and evidences of debt other than State obligations and certificates now remaining in the offices of the Governor, auditor, and treasurer, and thereafter cause the same to be destroyed in the manner herein directed for the destruction of evidences of debt received in exchange or in payment under the provisions of this act. They shall also demand and receive from all other agents and depositions heretofore employed by or on behalf the State all bonds, notes, or other evidences of debt against the State which may remain in their possession; and said commissioners are hereby authorized to execute proper receipts and discharges therefor in the name of the State, and upon receipt thereof they are hereby directed to make proper description and cancellation and destruction thereof as prescribed in relation to bonds, notes, and other evidences of debt received in exchange or on payment under authority of this act.

Commissioners to report to Governor.

SEC. 21. Be it further enacted, That said commissioners shall cause report of all that that they may do under the provisions
98 of this act to be made to the Governor, to be by him laid before the General Assembly at

its next session. Said report shall particularly state in what manner such duty assigned them under this act has been performed, and set forth what bonds herein and hereby authorized have been issued, and how used and applied, and what bonds of former issues, and what notes and other evidonces of debt have been received and cancelled and what destroyed, what debts and liabilities have been paid or in any way retired or extinguished, and generally shall make report of all matters and things that have come to their knowledge and not heretofore reported necessary to a proper registry of the bonded indebtedness and a correct statement of the financial condition of this State.

Appropriation to carry into effect the provisions of this act.

SEC. 22. Be it further enacted, That the sum of fifteen thousand dollars, or as much thereof as may be necessary, from any money in the treasury of the State not otherwise appropriated, be, and the same is hereby, appropri-
99 ated to carry into effect the provisions of this act, and the auditor shall draw his warrant on the treasurer therefor upon the application of said commissioners, who shall pass their accounts for all moneys so by them received before the auditor, and shall also account with the treasurer for all bonds, notes, coupons, or other evidences of debt against the State which shall in any mode or manner have come to their hands or possession by virtue of this act, or in their character and office as commissioners under said act of the 17th of December, 1874.

SEC. 23. Be it further enacted, That all laws and parts of laws, so far as they are in conflict with the provisions of this act, be, and the same are hereby, repealed; but nothing in this act contained shall in any manner affect the bonds held by or for Agricultural and Mechanical College.

Approved February 23, 1876.

EXHIBIT "E" to original bill.

STATE OF ALABAMA, *Montgomery County:*

KNOW all men by these presents that the State of Alabama,
100 in pursuance of the act of the General Assembly "to ratify and confirm the settlement of the existing indebtedness of the State, as proposed in the report of the commissioners appointed under the act approved 17th December, 1874," and which was communicated to the General Assembly by the message of the Governor of the 24th of January, 1876, and to carry said settlement into effect by the issuance of new bonds of this State, at a reduced rate of interest, in adjustment of a portion of said indebtedness, and the surrender of certain securities held by the State in discharge of another portion of said indebtedness, approved February 23rd, 1876; and in consideration of the full and perfect performance of all the conditions and requirements contained in said act by the holders of the bonds hereinafter mentioned, doth hereby assign, transfer, convey, remise, release, and forever quit claim unto John A. Billups, of the county of Pickens, and State aforesaid, the trustee appointed by the Governor of

this State under the authority of the said act, and unto John Swann, of 5 Frederick's Place, Old Jewry, London, the trustee ap-
101 pointed by the bondholders by virtue of the authority granted by said act, and their successors, all the bonds issued by the Alabama and Chattanooga Railroad Company to the Governor of this State in exchange for the bonds of the State of Alabama issued under the authority of the act to loan the credit of the State of Alabama to the Alabama and Chattanooga Railroad Company for the purpose of expediting the construction of the railroad of said company within the State of Alabama, approved February 11th, 1870; the deed of mortgage executed by said Alabama and Chattanooga Railroad Company to the State of Alabama, dated second of March, 1870, to secure the payment of said bonds as issued by said railroad company, as required by said act of 11th of February, 1870, all the right, title, and interest which this State has, or is entitled to, in the lands and property described in said deed of mortgage last named executed by said railroad company; all the right, title, estate, and interest acquired by said State in the lands and property mentioned and described in said mortgage at the purchase under the decree of the district court of the United States for the middle district
102 of Alabama in the matter of bankruptcy of the Alabama and Chattanooga Railroad Company; all the right, title, and interest which this State has in or upon or to the telegraph lines and telegraph offices and instruments, and on the machine shops and machinery, and all coal mines and iron and mineral, lands and iron and manufacturing establishments, or all or any other property in said statute of 11th of February, 1870, referred to by operation of said statute, or by any deed or conveyance or contract made by said railroad company for the indemnity and protection of this State; all money yet unpaid by purchasers of any parts, parcels, or portions of said lands embraced in said mortgage to this State by said railroad company, and which have been sold by said railroad company under the authority reserved to it in said act of the 11th of February, 1870; any and all sums of money and securities remaining in the hands or possession of any person or persons, corporation or corporations; the proceeds of any lands, part of said mortgage property, which may have been sold under the authority reserved as afore-
103 said and which have not been accounted for and paid into the treasury of this State as required by said act of 11th of February, 1870; all the right, title, and interest which the State has in or to any part of the land embraced within the conflicting or overlapping limits of lands granted by the acts of Congress for the benefit of railroads in this State, and which, on partition heretofore made or hereafter to be made, by agreement or otherwise, shall be assigned or conveyed to said Alabama and Chattanooga Railroad Company or its assignees as the part belonging to said railroad company under said grants by Congress, and is or may be embraced in any conveyance to this State by said railroad company or covered by any lien held by this State by any statute or by any contract or agreement made by said railroad company for the benefit of the State; but nothing herein contained shall convey or give any right to said

trustees or the holders of said bonds in any lands held by this State under said acts of Congress, as trustee for the construction of any railroad, the beneficial interest wherein is not held by this State, all right of this State upon or against said railroad company,
104 for the creation and preservation of a sinking fund and the payment into the treasury of the proceeds thereof, subject, however, to the conditions contained in the sixteenth section of the act approved February 23, 1876, by authority of which this conveyance is made.

To have and to hold all the said property, and all the right, title, and interest in the said property hereby assigned, transferred, and conveyed, unto the said John A. Billups and the said John Swann, trustees, as aforesaid, and their successors, forever, upon trust and confidence, nevertheless, that the said trustees shall receive and apply said property and rights for the use and benefit of the holders of said bonds mentioned in the fifteenth section of the said act approved February 23rd, 1876, who may accept the said act in relation thereto and surrender their bonds as therein provided. Said trustees shall proceed and collect all the choses in action hereby assigned and transferred, and shall proceed and sell all the other property hereby conveyed under authority of said act, and, after paying into the treasury of this State ten per cent. of the net
105 proceeds of the sales of all said lands so made by them, having first deducted the reasonable expenses incurred in executing the trust thereof till the whole amount of interest heretofore paid by this State upon said bonds described in the fifteenth section of said act shall be reimbursed to the State, shall distribute the proceeds of all collections and sales so made by them among the holders of said bonds in proportion to their respective interest therein. Said trustees shall have power to sell for and recover for the purpose aforesaid all choses in action and claims and demands of all kinds herein conveyed, and to sue for and recover all lots and parcels of lands hereby conveyed which have been obtained, and are now held, under fraudulent and fictitious sales and conveyances, and for this purpose, if need be, may use the name of the State, but always at their own cost and charge; but where sales of said lands, or any portion thereof, have heretofore been made to purchasers in good faith under the authority reserved to said railroad company by the said act approved February 11th, 1870, said trustees shall make
106 title thereto where not already made, but shall collect the purchase-money therefor when not already paid, and all sums, part of said purchase-money, remaining unpaid, and be entitled to all the securities for the payment thereof; said sales of land may be made from time to time as may be found expedient and in the manner most beneficial to said bondholders, and said trustees may make title thereto to all persons and corporation purchasers who may be permitted by the constitution of this State to hold lands therein till the whole of said lands are sold. All moneys realized from said trust property shall be distributed so that all holders of said bonds who may have surrendered the same to the Governor, or as directed in the said act approved February 23rd, 1876, shall receive their

proportionate share thereof, but the residue shall be retained by said trustees, and distributed to the several holders of bonds in their respective proportions only when they shall surrender their said bonds as provided in the said act of Feruary 23d, 1876; but the trust hereby created shall be closed at the end of ten years from
107 the first day of May, eighteen hundred and seventy-six, after which date all of said bonds described in the fifteenth section of said act, approved February 23d, 1876, not then presented and surrendered, shall become barred of all rights to participate in the benefits of this trust, or share in the proceeds thereof, and shall have no claims against this State, and all money then in the hands of said trustees, part of said trust estate, shall be distributed *pro rata* among the holders of said bonds who shall have surrendered the same; and all lands then remaining unsold shall be conveyed by said trustees to such persons so entitled to share in said trust moneys, or to such person or persons as they may direct. The said bonds and mortgages of said railroad company herein assigned to the said trustees and the rights of those beneficially interested therein, *and* shall not, by this assignment, be held to be extinguished or in any manner impaired, but shall remain an existing security for the purpose aforesaid. Said trustees, for their services, shall be paid such commissions upon the proceeds of collections and sales as the majority in number and value of the bondholders
108 as shall have surrendered their bonds may determine; the said trustees shall give notice of their appointment and of the terms of this trust at least four times in each year by advertisement in the London Times newspaper and in one daily newspaper in the city of New York.

In witness whereof I, George S. Houston, as Governor of the State of Alabama, by virtue of the authority of the said act of the General Assembly of Alabama, approved February 23d, 1876, in me vested, have set my hand and caused the great seal of the State of Alabama to be hereunto affixed on this the eighth day of February, A. D. one thousand eight hundred and seventy-seven.

Here we rest.

GEO. S. HOUSTON,
Governor of the State of Alabama.

Sworn to and subscribed before me, this the 8th day of February, 1877.

C. D. WHITMAN,
Notary Public.

STATE OF ALABAMA, *Montgomery County:*

I, C. D. Whitman, a duly authorized and commissioned notary public of said State, hereby certify that George S. Houston,
109 whose name is signed to the foregoing conveyance and who is known to me, acknowledged before me this day that, being informed of the contents of the conveyance, he, as Governor of said State of Alabama, executed the same voluntarily on the day the same bears date.

Given under my hand this the eighth day of February, in the year of our Lord one thousand eight hundred and seventy-seven.

C. D. WHITMAN,
Notary Public.

Endorsed: "Filed 28th May, 1883. T. M. McConnell, C. & M., by J. B. Ragan, D. C. & M."

Subpœna to Answer.

State of Tennessee to the sheriff of Hamilton county, Greeting:

We command you to summon T. G. Montague, Xenophon Wheeler, Thomas Webster, George M. Sherwood & wife, Sarah M. Sherwood; Marion Carlile, W. W. Younge & wife, Nellie Younge & Cornelia & Elois Carlile, minors; D. T. Blanton, Sam'l Worthy & wife, Mattie Worthy, Anna Cole, —— Lane, George Harris (col'd), Charles Paxton, Maggie Roberts & husband, —— Roberts; G. C. Rhinehart, Jacob Peyer, Jacob Kauber, J. Keener, W. J. Keelin, N. J.
110 Congle, J. Foster Rogers, Maggie Roberts and William Roberts, O. L. Wagner, J. P. McMillin, D. C. McMillin, Jr., & Jas. A. Bass, & B. Post, if to be found in your county, to appear before the chancellor holding the chancery court of Hamilton county at the next August rules of said court, to be held in Chattanooga on the 1st Monday in August next, then and there to answer the bill of complaint of John Swann, John A. Billups, as trustees & assignees, a copy of which is herewith issued, and further to do and receive what our said court shall consider in that behalf; and this you shall in nowise omit under the penalty prescribed by law.

Herein fail not, and have you then and there this writ.

Witness T. M. McConnell, clerk & master of our said court, at office, in the city of Chattanooga, this 3rd Monday in April, 1883.

T. M. McCONNELL,
Clerk and Master.
By J. B. RAGON, *D. C. & M.*

Endorsed.

"Issued 28th May, 1883.

"T. M. McCONNELL, *C. & M.*,
"By J. B. RAGON, *D. C. & M.*

"Came to hand 12 June, 1883, and executed by reading and making known to T. G. Montague, Xen. Wheeler, Geo. M. Sherwood, W. W. Younge, J. A. Bass, J. F. Rogers, J. P. McMillin, D. C. Mc-
111 Millin, D. C. McMillin, Jr., and B. Post the contents of the within and summoning them as commanded, and delivering to the said Montague the copy of bill.

"Executed in full of the said Montague & Wheeler 15th June, 1883; executed on J. P. McMillin 19th June, 1883; executed on G. M. Sherwood 22nd June, 1883; executed on W. W. Younge, J. A. Bass, and D. C. McMillin, Jr., & B. Post 26th June, 1883; executed on J F. Rogers 2d July, 1883.

"C. E. STANLEY, *Dep. Sh'ff.*

"Executed June 27th, 1883, on N. G. Congle, Jacob Peyer, D. F. Blanton, Chas. Paxton, Samuel Worthy. June 28, 1883, executed on Nellie Yonge. June 29, 1883, executed on Thos. Webster, Marion Carlile, Cornelia Carlile, & George Harris & Eloise Carlile. July 4th, executed on J. C. Reinhart. Executed on all the defendants mentioned above by reading and making known the contents of this subpœna and by summoning them as commanded.

"August 1st, 1883.

"H. J. SPRINGFIELD, *Sheriff.*

"The within-named defendants, Mattie Worthy, Anna Cole, and William Roberts are reliably reported to be dead. Search made for —— Lane, Maggie Roberts, Jacob Knuber, J. Kechner, W.
112 J. Keelin, and O. L. Wagner, but they are not to be found in my county.

"August 1st, 1883.

'H. J. SPRINGFIELD, *Sheriff.*

"Executed in full as commanded, on Sarah M. Sherwood, wife of Geo. M. Sherwood.

"Aug. 3d, 1883.

"C. E. STANLEY, *Dep. Sh'ff.*"

Demurrer of T. G. Montague & Others.

In the Chancery Court at Chattanooga, Tennessee

JOHN SWANN, *et al. vs.* T. G. MONTAGUE, *et als.*

The demurrer of T. G. Montague, Xen. Wheeler, Thos. Webster, Geo. M. Sherwood, Sarah M. Sherwood, Marion Carlile, W. W. George, Nellie Yonge, D. F. Blanton, Samuel Worthy, Martha Worthy, Charles Paxton, Maggie Roberts & husband, Wm. Roberts, G. C. Rhinehart, Jacob Peyer, Jacob Knuber, J. Foster Rogers, J. A. Boss, Isaac H. Tower, Charles Woodburry, Bradford Post, Walter Carlile, Albert D. Mahoney, Anna Cole to the bill of complaint of John Swann, John A. Billups, and the State of Alabama complainants, filed in the above-entitled cause.

These defendants, by protestation, and not confessing or acknowledging all or any part of the matters and things in the
113 said bill of complaint to be true, in manner and form as the same are therein and thereby alleged, do demur thereto, and assign the following grounds and causes of demurrer:

1st. The bill shows on its face that complainants could not in — event be entitled to any relief by virtue of the mortgage on which suit is brought until the surrender to the Governor of the State of Alabama of at least a portion of certain bonds issued by the State of Alabama in exchange for the bonds secured by said mortgage, and fails to show that any of the said bonds of the State of Alabama have been so *summoned*, or, if any have been so surrendered, fails to show the amount thereof, or by whom surrendered.

2d. It appears by complainants' own showing in said bill that in the event complainants are granted any relief in the suit no dispo-

sition can be made by complainants of the property alleged to be included in said mortgage, or its proceeds, other than such as is prescribed in and required by the act of the Legislature of the State of Alabama, approved February 23d, 1876, which is referred to and made a part of said bill and such as is prescribed in and re-
114 quired by the deed of conveyance, made by the Governor of said State of Alabama in pursuance of said act of the Legislature to complainants, Swann and Billups, as trustees, bearing date February 8th, 1877, and which is also referred to in and made a part of said bill. And it further appears from said bill that such disposition of said property or its proceeds is not authorized by the terms of the mortgage, but in violation thereof, and would be an unauthorized and fraudulent misappropriation of the property or fund arising therefrom to objects and purposes not embraced in the mortgage, a breach of trust, and a fraud upon the rights of these defendants, and that no relief can be granted complainants in the premises without aiding in such breach of trust and unauthorized and fraudulent appropriation of the property or its proceeds.

3d. It appears from complainants' own showing in said bill that the mortgage upon which this suit is brought is an indemnity mortgage, made for the purpose of indemnifying the State of Alabama against the payment of certain of its bonds and the interest
115 thereon, and further shows that the State of Alabama has been fully paid and reimbursed for all payments made by it on its bonds, and that said State of Alabama has been released and discharged from all further payment of or liability upon its said bonds and said bonds required to be cancelled and destroyed, and that the mortgage is therefore discharged and the estate of the mortgagee defeated.

4th. The bill of complaint shows on its face that no part of the principal of said mortgage bonds is yet due, and that as to any and all interest remaining unpaid there has not been since the last payment of interest thereon and is not now any person entitled to receive payment of interest thereon, or at least that there is an uncertainty as to whether or not any person was so entitled, or, if entitled, who were so entitled; that such uncertainty has been occasioned by the acts of the mortgagee, and the non-payment of interest under such circumstances does not work a forfeiture of the mortgage, and the bill does not show that any one is now entitled to receive payment of said interest, or, if any one is so entitled, who is entitled, or the amount to which he is entitled.

116 5th. The bill of complaint and the mortgage and other papers made exhibits thereto and a part thereof fail to show that the property described in the bill as situate in Chattanooga, Tennessee, is embraced in the mortgage.

6th. There is no equity in complainants' bill, for the reason that it is shown therein that before any default or failure to pay interest upon the bonds secured by the mortgage the State of Alabama relieved itself of all liability upon the bonds, against the payment of which it was indemnified by said mortgage, conveyed all property embraced in the mortgage to complainants, Swann and Billups, as

trustees, as its own property, and as having the full and absolute right and title thereto and the right to dispose of the same absolutely, and assumed to invest said trustees with the unlimited power and authority to sell and dispose of the property included in the mortgage, and in such manner, to such persons, and upon such terms as they might see proper, regardless of any default on the part of the *part of the* mortgagee & in violation of the rights of these defend-
117 ants, requiring said trustees to pay to the State of Alabama, out of the mortgaged property, or its proceeds, a large amount of money alleged to have been paid by said State of Alabama as interest upon its bonds, and which interest, the bill shows, had before that time been repaid to said State by the mortgagor, or that funds for that purpose were in the possession and under the control of the State of Alabama, which it was its duty to so apply, and further requiring said trustees to apply a part of the proceeds of the mortgaged property to the payment of their commissions or salaries and expenses; and further, to apply the proceeds of the mortgaged property to the payment only of such of certain bonds of the State of Alabama as might be surrendered by the holders thereof, who should accept and surrender their bonds before the principal of said bonds become due, and before the 1st day of May, 1886, making it a condition of the conveyance in trust that all who accepted its benefits should release the State from all liability, and the holders of bonds not accepting the benefits of said conveyance in trust by May 1st, 1876, to not get anything, and then requiring said trustees to distribute such
118 portions of the mortgaged [property] as might remain, or the surplus arising therefrom, among such of said bondholders as may have surrendered their bonds, without regard to the amount of the bonds so surrendered, or the value of the property so distributed, and requiring such absolute disposition of the whole of the mortgaged property to be made and completed by the 1st day of May, 1886, and some thirteen years before any part of the principal of said mortgage bonds would become due, all in violation of the terms of the mortgage, and in fraud of the rights of these defendants.

7th. The bill of complaint shows on its face that complainant, the State of Alabama, has parted with all of its right, title, and interest in said mortgage, and the bonds secured thereby, and is not entitled to any relief, and is not authorized to join in this suit, and also shows that the complainants, Swann and Billups, are not authorized to bring this suit or any suit upon said mortgage.

8th. There is a misjoinder of parties complainant, the State
119 of Alabama having parted with all of its interest in the bonds and mortgage, and the property included in the mortgage, and not being entitled to any of the proceeds of the mortgaged property, as shown in the bill, is not entitled to any relief, and should not have been joined as a party complainant.

9th. There is a want of proper parties to the bill, the *cestui qui* trusts or beneficiaries under the conveyance in trust to Swann and Billups not having been made parties to the bill, so that the extent of their respective interests could be ascertained, nor is any suffi-

cient reason shown in the bill why they are not made parties to the same.

10th. The bill fails to show that any money is required for the purpose for which the mortgage was executed, and until that is done complainants are not entitled to any relief.

11th The bill shows that none of the complainants are entitled to any relief outside of the conveyance in trust to Swann and Billups, and that that is fraudulent and void, for fraud on its face, illegal, immoral, & against public policy.

Wherefore, and for other good causes of demurer appear-
120 ing in the bill of complaint, these defendants do demur to said bill and to all matters there contained, and pray judgment of the hon. court whether they shall be compelled to make any further or other answer to said bill; and they pray to be hence dismissed with their reasonable costs in this behalf sustained.

WHEELER & MARSHALL,
Sol's for Defendants named in Demurrer.

Endorsed: Filed 1st Sept., 1883. T. M. McConnell, C. & M.

Amended Bill.

In the Chancery Court of Hamilton County, Tennessee.

JOHN SWANN *et al. vs.* T. G. MONTAGUE *et al.*

The amended bill of complainant in said cause.

1. Complainants charge and say that after the 1st day of May, 1876, and before the execution of said deed (Exhibit "A" to the original bill) by the Governor of Alabama, to the said John Swann and John A. Billups, in February, 1877, as set forth in the original bill in this cause, the said John Swann was appointed trustee by a majority in number and value of such of the holders of said bonds mentioned and described in the 15th
121 section of said legislative act of February 23d, 1876, as by the 1st day of May, 1876, did signify in writing to the Governor of Alabama their intent to surrender their said bonds to the Governor of said State under the terms of said last above-described legislative act; and the said John A. Billups was appointed by the Governor of Alabama as a trustee under said last above-mentioned legislative act and the said appointment of said Swann, as well as the appointment of said Billups was, duly made shortly before the execution of said deed to them by the Governor of Alabama under and in pursuance of the provisions of said last above-mentioned legislative act, and to carry into effect sections fifteen (15), sixteen (16), seventeen (17), and nineteen (19) of said last above-mentioned legislative act.

By the 1st day of May, 1876, the holders of more than one-sixth ($\frac{1}{6}$) of the bonds mentioned and described in the 15th section of said last above-mentioned legislative act, had signified in writing to the Governor of Alabama their intent to surrender their said bonds to

the Governor of Alabama under the terms of the said last
122 above-mentioned legislative act; but the holders of more than one-tenth ($\frac{1}{10}$) of the bonds mentioned and described in the 15th section of said last above-mentioned legislative act have never signified their intent to surrender their said bonds under the terms of said last above-mentioned legislative act. The last mentioned holders of said bonds as well as their names are wholly unknown to complainants.

And complainants allege and say that at the time of the filing of said original bill in this cause a majority in number and value of the holders of said bonds mentioned in the 15th section of said act of February 23d, 1876, had signified in writing to the Governor of Alabama their intent to surrender their said bonds under and in pursuance of said last above-mentioned legislative act of Feb'y 23d, 1876, had accepted the terms of said act in relation to said bonds in sec. 19 thereof, and had surrendered their said bonds as provided in said act of Feb'y 23, 1876.

Complainants further charge and say that although the defendants in this cause claim and pretend to have some title or
123 interest in the said lands as to which a foreclosure of said mortgage and sale are sought, these complainants allege that no such claim or pretence of said defendants or of any of them, do or can amount to any impediment or bar to the relief sought by complainants in this cause, or to anything more than cloud on the title to said lands, and that this cloud ought to be removed so far as it exists so as to prevent any sacrifice of said lands when sold under the decree of this court in this court.

Complainants pray that the above be allowed as an amendment to their said original bill of complaint, and that the said defendants in the original bill mentioned be served with due and proper notice of this amendment, and they be required to answer the same, but none of them are required to answer under oath, their oaths being hereby expressly waived. And complainants pray for the relief as set forth in their said original bill, and for such other, further and general relief as the facts of their case and equity will allow.

JOHN SWANN.
JOHN A. BILLUPS &
THE STATE OF ALABAMA.

SAM'L F. RICE, &
PHELAN & GOREE,
Sol's for Compl'ts.

124 We acknowledge service of the foregoing amended bill and waive service of copy, notice, & subpœna, this Oct. 1, 1883.

WHEELER & MARSHALL, *Att'ys.*

The clerk & master is directed not to issue any process under this amended bill. This Oct. 1, 1883.

S. F. RICE, & PHELAN & GOREE,
Sol's for Comp'l'ts.

Endorsed: "Filed 1st Oct., 1883. T. M. McConnell, C. & M., by J. B. Rayon, D. C. & M.

Order *pro confesso.* See rule docket below.

Petition for Removal of Cause to Federal Court.

In the Chancery Court of Hamilton County, State of Tennessee.

JOHN SWANN *et als*, Compl'ts,
vs.
T. G. MONTAGUE *et als*, Def'ts.

Petition for removal to the circuit court of the United States for the southern division of the eastern district of Tennessee.

To said chancery court:

Your petitioners, Theodore G. Montague, Xenophon Wheeler, George M. Sherwood, Charles Woodbury, and Isaac H. Tower,
125 respectfully show to this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum or value of five hundred dollars.

That the controversy in said suit is between citizens of different States, and that petitioners, Montague, Wheeler, [and] Sherwood, were at the time of the commencement of this suit and still are citizens of the State of Tennessee. Petitioner Woodburry was at the time of the commencement of this suit and still is a citizen of the State of California; and petitioner Tower was at the time of the commencement of this suit and still is a citizen of the State of Massachusetts; and complainant, John Swann, was at the time of the commencement of this suit and still is, as petitioners are informed and believe, a citizen of the kingdom of Great Britain; and compl'ts, the State of Alabama and John A. Billups, were at the time of the commencement of this suit and still are citizens of the State of Alabama.

Your petitioners state that in said suit above mentioned there is a controversy, which is wholly between citizens of different States, and which can be fully determined as between them, to wit,
126 a controversy between your petitioners and the said John Swann, John A. Billups, and the State of Alabama.

Said complainants in said suit seek to foreclose a mortgage executed by the Alabama & Chattanooga Railroad Co. on the 2d day of March, 1870, to the State of Alabama, and which, compl'ts allege, includes a tract of land of about twenty-two acres lying within the corporate limits of the city of Chattanooga, Tennessee, which was bought by said Montague, Wheeler, Tower, G. M. Sherwood, Francis Woodburry, ancestor of petitioner; Charles Woodburry, and one Lewis Aufrecht, and most of which is still owned by petitioners, who deny that said mortgage embraces the land claimed by complainants, and also deny that they can maintain any bill to foreclose, even if the mortgage embraces said land. [There is a separate controversy between your petitioner upon one side and the compl'ts upon the other in this: that petitioners, with Louis Aufrecht, who died about the commencement of this suit, and whose representatives are unknown to petitioners, and Francis Woodburry, also dead, but whose interest has been acquired by petitioner,
127 Charles Woodburry, the original owner of said tract of 22 acres; that during the lifetime of said Francis Woodburry

and Louis Aufrecht a part of said tract *were* sold to other parties, some of whom are codefendants in this cause, and deeds were executed to said parcels so sold; that petitioners hold the greater part of said tract, and have no interest in other parcels sold as aforesaid, and petitioners, with the heirs of said Aufrecht, dead, are the owners as tenants in common of a part of said tract, in which none of the other defendants have any interest.

W. S. MARSHALL.

Subscribed and sworn to before me, this April 18th, 1884.
A. R. HUMES, *Clerk.*]

Your petitioners offer herewith a bond, with good and sufficient surety, for their entering in said circuit court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto. And petitioners pray this honorable court to proceed no further herein, except to make the order of removal
128 required by law, and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States in and for the southern division of the eastern district of Tennessee; and they will ever pray.

WHEELER & MARSHALL,
Attorneys for Petitioners.

STATE OF TENNESSEE, }
Hamilton County, } *ss:*

I, W. S. Marshall, being duly sworn, do say: That I am a member of the firm of Wheeler & Marshall, the attorneys for the petitioners in the above-entitled cause; that I have read the foregoing petition and know the contents thereof, and that the statements and allegations therein contained are true, as I verily believe.

W. S. MARSHALL.

Subscribed by the said W. S. Marshall in my presence, and by him sworn to before me, this — day of October, A. D. 1883.

T. M. McCONNELL, *C. & M.*

"Endorsed: Filed 18th Oct., 1883. T. McConnell, C. & M., by J. B. Ragon, D. C. & M.

Bond for Removal of Cause to Federal Court.

Know all men by these presents that we, Theodore G.
129 Montague, Xenophon Wheeler, Isaac H. Tower, G. M. Sherwood, and Charles Woodburry, as principals, and W. S. Marshall, as surety, are held and firmly bound unto John Swann, John A. Billups, and the State of Alabama in the penal sum of five hundred dollars, the payment whereof will and truly be made unto the said John Swann, John A. Billups, and the State of Alabama, their heirs, assigns, and legal representatives and successors, — we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents, yet upon these conditions: The said Theodore G.

Montagne, Xenophon Wheeler, Isaac H Tower, G. M. Sherwood, and Charles Woodburry, having petitioned the chancery court of Hamilton county, State of Tennessee, for the removal of a certain cause therein pending, wherein John Swann *et al.* are complainants, and said T. G. Montague *et al.* are defendants, to the circuit court of the United States in and for the southern division of the eastern district of Tennessee: Now if the said Theodore G. Montague, Xenophon Wheeler, Isaac H. Tower, G. M. Sherwood, and Charles Woodburry, your petitioners, shall enter in the said circuit
130 court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wronfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this 18th day of October, A. D. 1883.

XENOPHON WHEELER. [SEAL.]
T. G. MONTAGUE. [SEAL.]
G. M. SHERWOOD. [SEAL.]
CHARLES WOODBURRY. [SEAL.]
By WHEELER & MARSHALL, *Sol's.*
ISAAC H. TOWER. [SEAL.]
By WHEELER & MARSHALL, *Sol's.*
W. S. MARSHALL. [SEAL.]

Endorsed: "Filed 18th October, 1883. T. M. McConnell, C. & M., by J. B. Ragan, D. C. & M.

Order for Removal. October Term (Nov. 2d), 1883.

JOHN SWANN *et al. vs.* T. G. MONTAGUE *et al.*

In this cause it appearing to the court that defendants, T. G. Montague, Xn. Wheeler, I. H. Tower, G. M. Sherwood, &
131 Chas. Woodburry, have filed in this court their bond and petition for the removal of this cause to the United States circuit court for the southern division of the eastern district of Tennessee, as required by the Federal statute;

And it being admitted in open court by the counsel of complainants that the cause is a removable one, and that said bond and petition are sufficient in law, it is therefore ordered by the court that said bond is sufficient, and the clerk & master of this court is directed to make out a full and perfect record of all the papers in the cause on payment of the legal fees therefor, and transmit the same to the circuit court of the United States for the southern division of the eastern district of Tennessee for further proceedings.

Order.

October Term (November 9th), 1883.

JOHN SWAN *et al. vs.* T. G. MONTAGUE *et al.*

In this cause, it appearing to the court that the following words

in the order heretofore made in this cause, to wit, "And it
132 being admitted in open court by the counsel of complainants that the cause is a removable one, and that said bond and petition are sufficient in law," were inadvertently entered:

It is now, therefore, on motion of the counsel of complainants, ordered by the court that said words be, and the same are hereby, rescinded and ordered stricken from said order and held for nought.

And the complainants here now, in open court, came and prayed an appeal to the next term of the supreme court of this State, at Knoxville, from the said order of removal of this cause to the said Federal court, which is granted upon bond being given in thirty days from the adjournment of this court.

Rule Docket, Chancery Court, Hamilton County, Tennessee.

No.	Solicitors.	Parties.
	Sam'l F. Rice & W. L. Eakin.	John Swann & John A. Billups, as trustees & assignees, &c., & The State of Alabama,
2879.		*vs.*
	Wheeler & Marshall.	Theodore G. Montague, Xenophon Wheeler, Geo. M. Sherwood & wife, Sarah M.; Marion Carlile, widow of T. J. Carlile; W. W. Young & wife, Nellie, Cornelia & Eloise Carlile; D. T. Blanton, Sam'l Worthy & wife Mattie, Anna Cole, —— Lane, Geo. Harris (col'd), Chas. Paxton, Maggie Roberts & Husband, —— Roberts, G. C.
133		Rhinehart, Jacob Peyer, Jacob Keichner, J. Keichner, W. J. Keilan, N. G. Congle, J. Foster Rogers, Maggie Roberts, Wm. Roberts, O. L. Wagner, J. P. McMillin, D. C. McMillin, Jr., & Jas. A. Bass, Isaac H. Tower, Lewis Aufrecht, Chas. Woodbury, Bradford Post, Walter Carlile, Albert D. Mahoney, Jacob Kauber, & Fredericke Wolffe, assignee in bankruptcy of the Alabama & Chattanooga Railroad Company.

1883, May 28th. Original bill to enforce mortgage, &c., filed.

1883, 28th May. Exhibits A, B, C, & E to or. bill filed.

1883, 28th May. Prosecution bond, W. L. Eakin, surety taken & filed.

1863, 8 June. Copy of bill 2,900 W. & Spa. to answer issued to Hamilton Co. for all the def'ts to Jno. A. Bass, inclusive, & also B. Post.

1883, 26 June. The following order of publication made & copy issued, viz:

It appearing from allegations in complainants' bill, which is sworn to, that Fredericke Wolffe, assignee, &c., of the Alabama & Chattanooga Railroad Company, Isaac H. Tower, Lewis Aufrecht, Charles

Woodbury, Bradford Post, Walter Carlile, Albert D. Mahoney, & Jacob Kauber are now residents of the State of State of Tennessee, so that the ordinary process of law cannot be served upon them.

It is ordered that publications be made for four successive weeks in the Democrat, a newspaper published in Hamilton county, notifying said non-residents to appear at the next August rules
134 of said court to be held at the court-house in Chattanooga on the 1st Monday in August next, and make defence to said bill, or the same will be taken for confessed, and the cause set for hearing *ex parte* as to them.

This 26th day of June, 1883.

T. M. McCONNELL, *C. & M.*,
By J. B. RAGON, *D. C. & M.*

Notice published 27 June, 1883. Fee, $4.00.

13 Aug.—Spa. to ans. ret'd, served by C. E. Stanley, D. S., on T. G. Montague, Xen. Wheeler, Geo. M. Sherwood, W. W. Yonge, J. A. Bass, J. F. Rogers, J. P. McMillin, D. C. McMillin, D. C. McMillin, Jr., B. Post, & Sarah M. Sherwood, and by H. J. Springfield, sh'ff, on N. G. Congle, Jacob Peyer, D. F. Blanton, Chas. Payton, Sam'l Worthy, Nellie Young, Thos. Webster, Marion Carlile, Cornelia Carlile, George Harris, Elasier Carlile, & G. C. Rhineheart, and not found as to in Lane, Maggie Roberts, Jacob Kauber, J. Kechner, W. J. Keller, & O. L. Wayne, and Mattie Worthy, Anna Cole; & Wm. Roberts, reported to be dead.

1st Sept.—Demurrer of T. J. Montague, Xen. Wheeler, Thos. Webster, G. M. Sherwood & wife Sarah M., Marion Carlile, W. W. Younge & wife Nellie, D. F. Blanton, Samuel Worthy, Martha Worthy, Chas. Paxton, Maggie Roberts & husband, G. C. Rhineheart, Jacob
135 Peyer, Jacob Kauber, J. Foster Rogers, J. A. Bass, I. H. Tower, Chas. Woodburry, B. Post, Walter Carlile, A. D. Mahoney, & Anna Cole, filed and notice given.

1st Oct., 1883.—Amended bill of compl'ts, filed without additional bond for costs, returnable to Oct. term. Service of process & issuance of same waived by compl'ts' & def'ts' sol's. (See endorsement on bill.)

Oct. Rules.—It appearing that publication has been duly made for def'ts Fred. Wolffe, assignee, &c., & Lewis Aufrecht, requiring them to make defense, as required by law, and it further appearing that def'ts W. G. Congle, J. P. McMillin, & D. C. McMillin, Jr., have been regularly served with process to answer requiring them to make defense; and it further appearing that all of said defendants have failed to make defense, it is, on motion of compl'ts' sol's, ordered that judgment *pro confesso* be, and the same is hereby, entered against said defendants and this cause set for hearing *ex parte* as to them.

This 1st Oct., 1883.

T. M. McCONNELL, *C. & M.*,
By J. B. RAGAN, *D. C. & M.*

18 Oct.—Petition of T. G. Montague, Xen. Wheeler, G. M. Sherwood, Charles Woodbury, & I. H. Tower for removal of cause to U. S. circuit court filed.

136 18 Oct.—Bond for removal; am't, $500. U. S. marshall surety taken & filed.

October Term.

Nov. 2.—Order removing cause to U. S. cir. court, &c.

Nov. 11.—Order rescinding in part the order of removal so as to show compl'ts did not consent thereto, and allowing compl'ts an appeal from said order of removal & 30 days from adjournment of court to give bond.

Execution Docket, Chancery Court Hamilton County, Tennessee.

No.	Solicitors.	Parties.		
2879.	Sam F. Rice & W. L. Eakin; Wheeler & Marshall.	John Swann *et al.* *vs.* T. G. Montague *et als.*		
1883.				
May 28th.	State tax			2 50
	Filing bill, .25; aff's, .25; filing 5 exhibits, 1.25; pros. bond, .25; surety, .25		2 25	
	Recording 25 copy of bill, 2.90; spa. to ans., .75; order of pub., .50; copy, .25		4 65	
	Filing demurrer of Montague *et al.*, .25; notice, .25; filing am't bill, .25		75	
	Pro confesso, .25; filing petition for removal, .25; aff., .25; bond, .50		1 25	
	Surety, .25; recording, .25; 2 orders, .50; docketing, .30; rules, .20		1 50	
137	Bill of costs		50	
				10 90
	Sheriff fees, C. E. Stanley, D. S., summoning 11 defendants			11 00
	Sheriff fees, A. J. Sprinfield, sh'ff, summoning 12 def'ts, $12.00; 6 searches, 1.50			13 50
	Printers' fees, "Democrat," G. C. Conner, pub., non-resident, notice			4 80
				42 70

Order Removing Cause to U. S. Cir. Court. October Term, 2d Nov., 1883.

Certificate of C. & M.

STATE OF TENNESSEE, *Hamilton County:*

I, T. M. McConnell, clerk and master of the chancery court in and for said county and State, hereby certify that the foregoing one hundred and three pages of words and figures comprise a full, true,

and perfect transcript of all the records, pleadings, exhibits, and proceedings had by said court in the cause wherein John Swann *et als.* are complainants and T. G. Montagne *et als.* are respondents, as the same remain of record, and on file in my office, except Exhibit "D" to the original bill, which I certify to be lost from the
138 file of said cause, and which exhibit, as copied into this transcript by agreement and direction of the solicitors of complainants and defendants, is copied from the published acts of Alabama of 1875–'76.

Witness my hand and the seal of said court, at — office, in the city of Chattanooga, Tenn., this 9th Febr'y, 1884.

[Seal of the Court of Hamilton County.]

T. M. McCONNELL, *C. & M.*,
By J. B. RAGON, *D. C. & M.*

Endorsed: In the U. S. circuit court, eastern district of Tenn. In Equity. No. 73. John Swann *et als. vs.* T. G. Montague *et als.*, Transcript from chancery court of Hamilton Co. Filed Mar. 10 1884. A. K. Humes, clerk U. S. cir. c't.

UNITED STATES OF AMERICA,
Southern Division of the Eastern District of Tennessee:

The joint and separate answer of T. G. Montague, Zenophon Wheeler, Isaac H. Tower, Geo. M. Sherwood, and Charles Woodbury to the bill of complaint filed against them and others by the
139 State of Alabama, John Swann, and John A. Billups in the chancery court at Chattanooga, Tennessee, and which has been removed to the circuit court of the United States for the southern division of the eastern district of Tennessee.

These defendants, relying upon the cause of demurrer heretofore pleaded, as through here formerly set out, and saving and reserving to themselves the benefit of all the usual exceptions, &c., for answer to so much and such parts of said bill as they are advised it is necessary and material for them to answer, answering, say—

They admit that the State of Alabama passed an act approved on the 11th of February, 1870, and that Exhibit "A" to the original bill is a true copy of said act; but as to whether the bonds authorized to be issued by virtue of said act were actually issued, or if issued, they were issued in conformity with the provisions of said act, then defendants have no knowledge, and can neither admit or deny the same, and require proof; nor do defendants know if the Alabama & Chattanooga Railroad Company accepted the loan
140 of two millions of dollars in bank and appropriated the proceeds to its own use and benefit, and defendants require proof of this allegation of the bill.

Defendants supposes it is true that the Alabama and Chattanooga Railroad Company did, as charged in the bill, issue and deliver to the State of Alabama its first mortgage bonds to the amount of two millions of dollars, bearing date March 2, 1870, and they suppose the description given of these bonds is correct, but of this they have

no knowledge except by hearsay, and they require the allegation of the bill in this regard to be shown by competent testimony.

Defendants admit that said railroad company professedly, in consideration of said loan of two millions of dollars in bonds issued to it by the State of Alabama, and to secure the payment of said loan and the issue of its own bonds in an equal amount, did execute a first mortgage to the State of Alabama dated March 2, 1870, of which Exhibit "C" to the bill is a true copy; and they further admit that said mortgage was duly registered in the register's
141 office of Hamilton county, Tennessee, on the 24th day of March, 1870.

They admit that if the Alabama & Chattanooga Railroad Company did issue, as charged, two millions of dollars in bonds to the State of Alabama in exchange for the two millions of straight bonds of the State, that it has not paid the interest thereon since Jan'y, 1876, and, upon information, they charge that no interest has been paid upon said bonds since Jan'y, 1871.

It is true that the bond exhibited with the bill has all its coupons falling due prior to Jan'y, 1876, cut off, but this defendants allege has been done with a purpose to give the court to understand that the interest upon the bonds had been paid for several years prior to 1876, and no default in the payment of interest had been made until several years after it really had been made, and the defendants insist that the representations made in the bill that the interest had been paid prior to Jan'y 1, 1876, are made with intent to avoid the bar of the Statute of Limitations, well known to be untrue, and constitute such a *suppressio veri* and *suggestio falsi* as should repel
142 compliance from a court of equity.

Defendants also admit that none of the principal of said bonds has been paid.

They admit that the Alabama & Chattanooga Railroad Company has declared and adjudicated an involuntary bankrupt in the district court of the United States for the middle district of Alabama, and they believe that Fred. Wolffe was appointed by said court the assignee in bankruptcy.

Defendants admit that Exhibit "D" to the bill is a correct copy of an act of the General Assembly of the State of Alabama, approved Feb'y 23, 1876, but they have no knowledge of the truth of the allegations in the bill, that by virtue of the provisions of said act compl'ts, Swann & Billups, have been vested and clothed with title to, and placed in possession of, the two millions of bonds issued by the Alabama & Chattanooga Railroad Co. to the State of Alabama, as trustees and assignees, nor do they know as to whether said Swann & Billups have been vested with the right to the security, and all the rights and remedies the State of Alabama had under and
143 by virtue of the mortgage executed by the Alabama & Chattanooga R. R. Co. to the State of Alabama, and they can neither admit or deny the allegations of the bill in these respects, and require strict proof of the same.

Defendants possess no knowledge as to the further allegations of the bill that the Governor of Alabama, in his official capacity, in

pursuance of the act of the General Assembly, approved Feb'y 23, 1876, on the — day of Feb'y, 1877, or at any other —, executed a deed to compl'ts, Swann & Billups, of which Exhibit "K" to the bill is a true copy, and defendants can neither admit or deny the correctness of the allegation, and they require proof, and suppose the deed itself can be produced if, indeed, any was ever executed.

These defendants deny that at the time said mortgage was executed, or before that time, the Alabama & Chattanooga R. R. Co. was the owner of or in possession of the piece or parcel of real estate described in the bill, and they deny that said real estate was really included and embraced in the mortgage, and upon information they charge that neither the mortgagor *or* mortgagee intended to
144 include or embrace said real estate in the mortgage, and upon information they charge that neither the mortgagee, the State of Alabama, *or* any of its officers or agents, had any knowledge of the existence of said piece or parcel of land, much less of its ownership by the Alabama & Chattanooga R. R. Co. at the date of the execution of the mortgage, or for years thereafter.

These facts will more clearly appear from the following considerations:

1. The tract is in no way described in the mortgage, the only words found in the mortgage upon which compl'ts base their claim being the words, "also the machine shops, and all other property in the States of Alabama, Tennessee, Georgia, and Mississippi belonging to said company." Defendants insist that even if the railroad company was the owner of the land at the date of the mortgage such a vague and indefinite description of it should not be sufficient to give the world notice of the claim of the mortgagee and effect a subsequent purchaser, who bought from the mortgagor for a valuable consideration, and without any actual notice, that the land
145 was intended to be included in the mortgage.

2. An examination of the mortgage will disclose the fact that the only real estate, strictly speaking, intended to be embraced in the mortgage was the land in the State of Alabama granted by Congress to the Alabama & Chattanooga Railroad Co. to aid in the construction of its road.

As to these lands all the title the mortgagor then had or any it might subsequently acquire should ennure to the benefit of the mortgagee.

After naming these lands in the mortgage, and providing for their sale and for the disposition of the proceeds of the sale the mortgage proceeds: "Also the telegraph line and telegraph offices along the line of said road and belonging to the said company; also the machine shops and all other property in said States of Alabama, Tennessee, Georgia, and Mississippi." It is manifest from the context that the words, "all other property, are used not in reference to land" but in reference to the same kind or class of property as that named in the preceding part of the same sentence, personal property
146 or property partaking of the character of both realty and personalty.

3. At the date of the execution of said mortgage, 2nd March, 1870,

the Alabama & Chattanooga R. R. Co had no title to the land described in the mortgage or at most had but an imperfect inchoate unregistered equitable title to it.

Defendants represent that the only evidence existing to show that said railroad company had even such an imperfect title is the recital in the deed of J. P. McMillin to the Alabama & Chattanooga R. R. Co., and which deed bears date March 31, 1870, nearly a month subsequent to the date of the mortgage; that the deed was executed in pursuance of a bond for title executed March 25, 1869, without stating to whom said bond was executed, and the bond, if due, was ever really executed, was never registered, and cannot be produced, and there is only a presumption from the recital that one ever was executed, or, if *due* was executed; that it was executed to the Alabama & Chattanooga R. R. Co.

If indeed the bond was executed to said company it would appear from the recitals in said deed that at the date of the mortgage
147 the mortgagor had paid but one-third of the purchase-money, *so* $3,000, and the balance of the purchase-money was not paid until subsequent to the execution of the mortgage, on the 31st March, aforesaid.

These defendants further represent that they are advised that, even if it should be held that the vague and indefinite description in the mortgage of March 2, 1870, included the land described in the bill, yet, since the mortgage contains no covenant of warranty as applied to "all other property," or any other covenant of title, but is in effect and in fact a mere quit-claim, the most that the mortgage would convey as to this property would be such title as the mortgagor possessed at the date of the mortgage, namely, a mere equitable title and the subsequently-acquired legal title enure to the benefit of the mortgagee, and the latter and the complainants, who stand in the shoes of the mortgagee, can in equity claim only such proportion of the land described in the bill as the money paid on the purchase before the execution of the mortgage bears to the entire purchase-money, and only the interest or title the mort-
148 gagor possessed at the date of the mortgage could be sold, if decree be for foreclosure could be procured at all.

Defendants are advised, and they so charge, that the act of the General Assembly of the State of Alabama, approved Feb'y 23, 1876, and the deed of the Governor of that State to compl'ts, Swann and Billups, executed in pursuance to said act, are invalid and void in law, and their provisions will not be enforced in a court of equity.

The mortgage of 2nd March, 1870, was intended to indemnify the State of Alabama against loss by reason of the issuance to the Alabama & Chattanooga R. R. Co. of two millions of dollars of its straight bonds. These bonds, if issued, were negotiated by the Alabama & Chattanooga R. R. Co. and passed into the hands of *bona fide* holders, who bought them in open market, while an equal number of bonds of the same denomination of the railroad company, intended to be secured by the mortgage, was delivered to the State to be held as indemnity or security.

149 The railroad company, as defendants are informed and believe, failed to pay the interest upon the bonds thus held by the State, and was adjudicated an involuntary bankrupt 1871. The State at about the same time refused to pay the interest upon the two millions of dollars of straight bonds issued to the railroad company, and in the hands of innocent holders who had purchased them, relying on the good faith and honor of a great State that the interest upon its bonds would be punctually met and the principal paid at maturity.

Thus the railroad company and the State were both defaulters at the date of the passage of the act of Feb'y 23, 1876.

The act proposed to substitute upon certain considerations the holders of its own bonds in its place and stead, and turn over to them the bonds of the railroad company with the security for their payment. But in the act inequitable provisions are inserted and violation of the implied terms of the mortgage affecting the owners of the straight bonds, and these defendants occupying the shoes of
150 the mortgagor, the railroad company, in the following particulars:

1. Only such of the holders of the straight bonds as will surrender their bonds shall have any of the benefits of the substitution. Those who prefer to retain their bonds rather than accept a doubtful and imperfect security shall have none of the benefits of the mortgaged property, but the proceeds of the sale of this property, however large the amount may be, shall be divided among those who surrender their bonds, however few may be the number of bonds surrendered, the act at the same time repudiating the payment of the bonds not surrendered, and, this before the principal of any of the bonds become due.

2. Under the act all the mortgaged property is to be conveyed to trustees is treated as the absolute property of the State, and the trustees are invested with unlimited power and authority to sell and dispose of the mortgaged property in such manner, to such persons, and upon such terms as they may see proper, without any reference to the rights of the mortgagor, or those claiming rights
151 through or under the mortgagor.

3. The act requires that from the proceeds of the sale of the mortgaged property a large sum shall be paid to the State when no just claim for such payment existed.

4. The act constitutes trustees parties not contemplated by the mortgagor or mortgagee at the time the mortgage was executed, and allows them a large sum from the proceeds of sale in payment of their expenses, and as commissioners on sales, thus overating the mortgaged property with burdens unjustly and illegally imposed.

Defendants charge that said act provides for such a disposition of the mortgaged property or its proceeds as is not authorized by the terms of the mortgage, but is in violation thereof, and such disposition would be an unauthorized and fraudulent misappropriation of the property or its proceeds, and would not convert the same to objects and purposes not embraced in the mortgage; would constitute a breach of trust and a fraud upon the bondholders and upon the

mortgagor or those claiming through the mortgagor, and no
152 relief can be granted compl'ts without aiding in such breach of trust and unauthorized and fraudulent appropriation of the mortgaged property or its proceeds.

Defendants represent that the bill and exhibits show that the State of Alabama has parted with any interest she may have had to the mortgage security. No holder of any bonds, either of the Alabama & Chattanooga R. R. Co. or the State of Alabama, are before the court asking for relief.

Compl'ts, Swann & Billups, are not mortgagees, nor in any manner interested therein under the conveyance by the State of Alabama to them other than to receive their salaries, commissions, and expenses, all of which is unauthorized; they have given no bond, so far as defendants can ascertain, for the proper disposition of the proceeds of the mortgage property, or the payment of any surplus to the defendants, who would be entitled to the same, and in fact are authorized by the act of the Legislature, and also by the in-
153 strument under which they claim to act, to distribute any surplus that may remain among such holders of the bonds of the State of Alabama as may have surrendered the same, and released the State from all liability thereon, and the defendants who would be entitled to such surplus would have no protection against their unauthorized acts.

Defendants do not admit the correctness of the allegations of the amended bill of complaint that before the filing of the original bill a majority in number and value of the holders of the bonds mentioned in the 15th section of said act had signified in writing to the Governor of Alabama their intention to accept the terms of said act in relation to said bonds in section 19 thereof, and had surrendered said bonds as provided in the act of Feb'y 23, 1876, nor do they admit that compl't, Swann, was appointed trustee by a majority in number and value of such of the holders of the bonds mentioned and described in the 15th section of the act as by the 1st day of May, 1876, had signified their intent in writing to surrender their said bonds. As to other allegations defendants have no knowl-
154 edge and can neither admit or deny their correctness and require proof.

Defendants do not know how many of the bonds have been surrendered by their holders or had been surrendered by May 1, 1876, or how many of their holders in value and number had signified their intent to surrender by May 1, 1876, and require proof.

Defendants would show that on the 31st day of March, 1873, after the execution of the mortgage, one J. P. McMillin conveyed the land described in the original bill by deed of that date to the Alabama & Chattanooga R. R. Co., the vendee, on that date, paying therefor the sum of $6,000.00, or two-thirds of the purchase-money, one-third having been paid March 25, 1869, as is recited in McMillin's deed.

Subsequently and on the 25th Feb'y, 1871, the Alabama & Chattanooga R. R. Co., through John C. Stanton, its general superintendent, and professing to be its attorney-in-fact, sold said land to

defendant, Thomas Webster, for the sum of $13,200.00, the
155 receipt of which was acknowledged in the deed of the company to Stanton, and this sum was actually paid by Webster to said company.

A certified copy of the deed to said Webster is herewith filed, marked Exhibit "A" to this answer, and prayed to be taken as a part of the same.

Subsequently, a doubt having arisen as to the legality of the execution of said deed, the Alabama & Chattanooga R. R. Company, on the 2nd March, 1871, by an instrument in writing of that date, expressly ratified and confirmed the sale made by Stanton to Webster, a duly certified copy of which is herewith filed, marked Exhibit "B" to this answer, and prayed to be taken as a part of the same. Both the deed and the ratification were duly registered in the register's office of Hamilton county, Tennessee.

On the 8th day of April, 1871, said Thomas Webster sold and conveyed said land by deed of that date to defendants, Montague, Fowler, Wheeler, Sherwood, Francis Woodbury, since deceased, and whose undivided interest is now owned by defendant, Charles Woodbury, and one Louis Aufrecht, for the sum of $13,200.00,
156 which sum was paid in cash to said Webster at the date of the deed, a duly certified copy of which is herewith filed, marked Exhibit "C," and prayed to be taken as a part of this answer.

Defendants represent that said Webster and these defendants and said Woodburry and Aufrecht, when they made their respective purchases, each paid a full and valuable consideration for said tract of land, and without any knowledge or notice of any adverse claim to the same, and particularly without any knowledge or notice of the alleged title of the compl'ts, or either of them, and they insist that said Webster and the purchasers from Webster were innocent purchasers of said land, having purchased without notice or any reasonable ground from which notice could be presumed, or any circumstances which would have placed any reasonable or prudent man upon inquiry of the title which compl'ts, or either of them, set up to said tract, and these defendants rely upon the plea of innocent purchase-s.

These defendants further represent that at the time of their
157 said purchase on the 2nd April, 1871, said tract of land was in the actual possession of no one, but was an open unenclosed common, upon which was no improvement of any kind, and that immediately after their said purchase and during the year 1871 they entered upon the possession of said land and enclosed a large spring upon the same with a brick wall, upon which wall they erected a substantial covered frame building intended to protect the spring, and which building has remained upon the premises ever since, and for several years a portion of the premises was leased, upon which the manufacture of brick was extensively carried on.

They further represent that in June, 1872, they sold a lot forming a part of said tract of land to one Nath'l Brice, and executed to him a bond for title, who, in the year 1873, erected a house upon said lot,

and subsequently these defendants, except Woodburry, with said Francis Woodburry and said Louis Aufrecht, became the purchasers of said lot at a judicial sale, and they still own said house and lot, which have been continuously occupied since 1873 by said
158 Brice and these defendants through their tenants.

Defendants insist that their possession of said tract of land, except as to such portions as they have sold, has been ever since their said purchase visible, exclusive, actual, notorious, adverse, and continuous for more than seven years next preceding the commencement of this action, and they plead and rely upon the statute of seven years as a complete and perfect bar to the recovery of complainants.

Defendants further represent that shortly after their said purchase they divided up a portion of the tract into blocks and lots by running streets through said portion, and they made sales of some of said lots, some of the purchasers being still in possession of the lots thus sold and are made defendants to this bill, and these defendants make a plat of the portion thus laid off with the lots sold, designated by the names of the purchaser and upon which the lot sold to Brice aforesaid for many years, & now owned by defendants, is marked,
159 and this plat, marked Exhibit "D," they pray to be taken as a part of this answer.

Defendants further insist that in any case complainants cannot foreclose their mortgage upon this tract of land if the mortgage should be held to embrace said tract and they were not otherwise precluded, nor could they have any other relief under their said bill until they shall first have exhausted the other property embraced in the mortgage upon the familiar principle that where one creditor has a lien upon two securities and another creditor has a lien upon one of the two the first creditor must first exhaust the security upon which he has the only lien, and only in case this security is insufficient to pay his debt can he have recourse upon the second security.

The mortgage shows that a large amount of property, exclusive of the tract of land described in the bill, and these defendants are informed, and so charge, that said other property consists, among other property, of many thousands of acres of mineral lands of very great value, only a small portion of which have ever been disposed
160 of, and defendants are advised that they have the right to insist that said lands and other property embraced in the mortgage, excluding the tract purchased by these defendants, shall be first sold and an account be taken showing what amount remains due upon the mortgage debt, if any, after such sales shall have been made and proceeds applied to the payment of the mortgaged debt.

Defendants are further advised, and they so insist, that complainants cannot have a decree to eject any of the defendants from said premises and place compl'ts in possession, since compl'ts by the mortgage never acquired the legal title to the land in any event and at best acquired but an equitable title upon which an action of ejectment will not lie either in law or equity.

Defendants further represent that complainants, before the institution of the present suit, brought their action at law against these

defendants and the other parties made defendants to this bill in the form of an action of ejectment in the circuit court of the
161 United States for the southern division of the eastern district of Tennessee, and being defeated in their said action in said court, they appealed said cause to the Supreme Court of the United States, where said cause is now pending and undetermined.

And now, having answered all the allegations of said bill that they are advised it is necessary or material for them to answer, defendants pray to be hence dismissed with their reasonable costs, &c.

WHEELER & MARSHALL,
Sol's for Def'ts.

T. MONTAGUE.
G. M. SHERWOOD.
XEN. WHEELER.
ISAAC H. TOWER.
CHAS. J. WOODBURY.
By WHEELER & MARSHALL,
Their Solicitors.

UNITED STATES OF AMERICA,
Southern Division of the Eastern District of Tennessee:

Before me, a notary public, personally appeared Theo. G. Montague, Xen. Wheeler, & Geo. M. Sherwood, three of the de-
162 fendants in the foregoing answer, who, being duly sworn, make oath that the matters stated in the said answer as of their own knowledge are true, and those stated upon information they believe to be true.

T. C. MONTAGUE.
XEN. WHEELER.
G. M. SHERWOOD.

Sworn to and subscribed before me this 5th July, 1884.

[Seal of Notary P. for Hamilton Co.]

HARRY W. DURAND,
Notary Public.

Endorsed: In equity. No. 73. In the U. S. circuit court for the southern division of the eastern dis't of Tenn. State of Alabama *et als. vs.* Theodore G. Montague *et als.* Joint answer of T. G. Montague, Xen. Wheeler, I. H. Tower, G. M. Sherwood, and Chas. J. Woodberry. Filed July 9th, 1884. W. G. McAdoo, Jr., deputy clerk.

For and in consideration of thirteen thousand and two hundred dollars to me paid, and the receipt whereof is hereby acknowledged,
I John C. Stanton, attorney-in-fact and gen'l sup't of the Ala-
163 bama and Chattanooga R. R. Company, have this day bargained and sold, and do hereby transfer and convey, unto Thomas Webster, of the city of Chattanooga, county of Hamilton, and State of Tennessee, the following-described real estate, viz: Lying within the corporate limits of the city of Chattanooga, Hamilton county, Tennessee, and bounded as follows, to wit: Beginning at a

stake the S. E. corner of a five (5) acre lot, known as the Billingsley lot, 233⅓ feet from J. B. Weaver's S. E. corner; thence south 70° east seven hundred and eighty-seven (787) feet to a stake; thence north 30° east nine hundred and thirty-three and one-third (933⅓) feet to a stake; thence north 70° W. five hundred and sixty-eight and one-half (568½) feet to the S. W. corner of the three-acre lot on which G. P. Fisher resides; thence W. 20° E. with the line of said three-acre lot three hundred and ninety-two (392) feet to a stake in the line formerly of J. P. Larry, now S. J. Boyce; thence N. 70° W. with said line five hundred and thirty-one feet to a stake, Slayton's N. E. corner; thence S. 20 W. with Slayton's and —— line three hundred and ninety-two feet to a stake; thence S. 70° E.
164 three hundred and sixteen (316) feet to a stake at the N. E. corner of the aforesaid Billingsley five-acre lot; thence S. 20° W. with line of said lot nine hundred and thirty-three and one-third feet to the beginning, containing about 22 acres.

To have and to hold the same to the said Thomas Webster, his heirs & assigns, forever in fee-simple. I do covenant with the said Thomas Webster that I am lawfully seized of said property, have a good right to convey it, and that the same is unencumbered. I do further covenant with said Thomas Webster and heirs and legal representatives that I will forever warrant and defend the title thereto against all lawful claims whatever.

Witness my hand and seal this 25th day of February, 1871.

J. C. STANTON, [SEAL.]
Att'y-in-Fact for Alabama & Chattanooga Railroad Company.

In presence of—
J. H. VANOLSKIN.
HENRY E. WAITE.

STATE OF TENNESSEE, *Hamilton County:*

Personally appeared before me, J. H. Hardie, clerk of the county court of Hamilton county aforesaid, J. H. Vanolskin and Henry
165 E. Waite, subscribing witnesses to the within deed, who, being first sworn, deposed and said that they are acquainted with J. C. Stanton, the bargainor, and that he acknowledged the same in their presence to be his act and deed upon the day it bears date.

Witness my hand at office this 25 day of February, 1871.

J. H. HARDIE, *Clerk.*

STATE OF TENNESSEE, *Hamilton County:*

REGISTER'S OFFICE.

February 25th, 1871, at 3 o'clock p. m., there was the foregoing deed and certificate received for registration, with thirteen dollars and fifty cents in U. S. revenue stamps attached and cancelled, and is now record- in book "U," pages 39 & 40.

Witness my hand at office in Chattanooga the day and date last above written.

JOHN F. HAMILL, *Register,*
Per J E. DEARING, *D. R.*

STATE OF TENNESSEE, *Hamilton County:*

I, H. C. Beck, register of said county, hereby certify that the foregoing two pages contain a full, true, and correct copy of a deed, together with the certificates of probate and registration thereof, made by A. & C. R. R. Co. to Thos. Webster, as the same remains
166 of record in my office.

Witness my hand, at office in Chattanooga, this 7th day of July, 1884.

H. C. BECK, *Register.*

Endorsed: Copy of deed A. & C. R. R. to Thos. Webster. Exhibit "A" to answer of T. G. Montague *et als.* Fee, $1.75.

Know all men by these presents that the Alabama & Chattanooga Railroad Company have made, constituted, and appointed, and by these presents do make, constitute, and appoint, John C. Stanton, the general superintendent of said railroad company, its lawful agent and attorney-in-fact, to sell, transfer, and convey a certain piece or parcel of real estate, situate within the corporate limits of the city of Chattanooga, Tennessee, bounded and described as follows, to wit: Beginning at a stake the S. E. corner of a five (5) acre lot, known as the Billingsley lot, 233⅓ feet from J. B. Weaver's S. E. corner; thence south 70° east seven
167 hundred and eighty seven (787) feet to a stake; thence W. 20° east nine hundred thirty-three and one-third (933⅓) feet to a stake; thence N. 70 W. five hundred and sixty-eight and one-half (568½) feet *feet* to the S. W. corner of *of* three acres on which G. O. Fisher resides; thence W. 20° E. with the line of said three-acre lot three hundred and ninety-two feet (392) *feet* to a stake in the line formerly of J. P. Long, now S. J. Boyce; thence N. 70° W. with said line five hundred and thirty-one feet to a stake, Slayton's N. E. corner; thence S. 20° W. with Slayton's and —— line three hundred and ninety-two feet to a stake; thence S. 70 E. three hundred and sixteen (316) feet to a stake at the N. W. corner of the aforesaid Billingsley five-acre lot; thence S. 20° W. with the line of said lot nine hundred and thirty-three and one-third feet to the beginning, containing about 22 acres, hereby ratifying and confirming any sale or disposition said agent or attorney may make or may have made in the premises, and the said J. C. Stanton is hereby authorized and empowered to make to the purchaser or purchasers of said
168 described premises a deed of warrant for the same to sign the name of *of* said company as attorney-in-fact, and any act of said attorney, or deed made by him, shall have the same binding force and effect as if made by the said Alabama and Chattanooga Railroad Company.

In witness whereof the said Alabama and Chattanooga Railroad Company, by its president, hereto sets its hand, affixes its corporate seal, this 2nd day of March, A. D. 1871.

[Seal Alabama & Chattanooga Railroad Company.]

ALABAMA & CHATTANOOGA
RAILROAD COMPANY,
By D. W. STANTON, *Pres't.*

Executed in the presence of—
WM. V. ANTE.
WM. H. CLARKSON.

STATE OF NEW YORK, *City & County of New York:*

Personally appeared before me, a commissioner of the State of Tennessee, duly appointed and commissioned, &c., D. W. Stanton, president of the Alabama and Chattanooga Railroad Company, of the county aforesaid, with whom I am personally acquainted and who acknowledged that he executed the within instrument for the purposes therein contained.

169 Witness my hand and official seal, at office in New York, this 2nd day of March, 1871.

[Seal Wm. V. Archer, a Commissioner for Tennessee in the City & County of New York.]

WM. V. ARCHER,
Commissioner for Tennessee in New York.

STATE OF TENNESSEE, *Hamilton County:*

REGISTER'S OFFICE.

March 6th, 1871, at 3 o'clock p. m., then was the foregoing instrument and certificate received for registration, with one dollar U. S. revenue stamps attached and cancelled, and is now of record in book "U," pages 83 & 84.

Witness my hand, at office in Chattanooga, the day and date last above written.

JOHN F. HARRILL, *Register,*
Per J. E. DEARING, *D. R.*

STATE OF TENNESSEE, *Hamilton County:*

I, H. C. Beck, register of said county, do hereby certify that the foregoing two and a half pages contain a full, true, and correct copy of a power of att'y made by the A. & C. R. R. to John C. Stanton, together with the certificates of probate and registration thereof, as the same remains of record in my office.

170 Witness my hand, at office in Chattanooga, this 7th day of July, 1884.

H. C. BECK, *Register.*

Enrolled: Copy of power [of] att'y. A. & C. R. R. Co. to John C. Stanton. Exhibit "B" to answer of T. G. Montague *et als.*

For and in consideration of thirteen thousand & two hundred dollars to me paid, the receipt whereof is hereby acknowledged, I, Thomas Webster, of the city of Chattanooga, Tennessee, have this day bargained and sold, and do hereby transfer and convey, unto Isaac H. Tower, of Durham, Mass.; Theodore G. Montague, Xen. Wheeler, & Geo. M. Sherwood, of Chattanooga, Tenn.; Francis Woodberry, of Jackson, Michigan, & Louis Anfrecht, of Cleveland, Ohio, the following-described real estate, viz., lying within the corporate limits of the city of Chattanooga, Hamilton county, Tennessee, and

bounded as follows, to wit: Beginning at a stake the S. E. corner of a five (5) acre lot, known as the Billingsley lot, 233⅓ feet from J. B. Weaver's S. E. corner; thence south 70° east seven hundred
171 and eighty-seven (787) feet to a stake; thence W. 20° east nine hundred and thirty-three and one-third (933⅓) feet to a stake; thence N. 70° W. five hundred and sixty-eight and one-half (568½) feet to the S. W. corner of the three acres on which G. O. Fisher resides; thence W. 20° E. with the line of said three-acre lot three hundred and ninety-two (392) feet to a stake in the line formerly of J. P. Long, now S. J. Boyce; thence N. 70° W. with said line five hundred and thirty-one feet to a stake, Slayton's N. E. corner; thence S. 20 W. with Slayton, and —— line three hundred and ninety-two feet to a stake; thence S. 70° E. three hundred and sixteen (316) feet to a stake at the N. E. corner of the aforesaid Billingsley five-acre lot; thence S. 20° W. with the line of said lot nine hundred and thirty-three and one third feet to the beginning, containing about 22 acres.

Said tract is deeded to said Tower, Montague, Wheeler, Sherwood, Woodberry, and Anfrecht in the following proportions, viz: To said Tower twenty-five one hundred thirty-seconds ($\frac{25}{132}$) of said tract; to said Montague and said Wheeler the same proportions
172 each; to said Sherwood and Woodberry jointly forty-seven one hundred thirty seconds ($\frac{47}{132}$) of said tract, and to said Anfrecht ten one hundred thirty-seconds ($\frac{10}{132}$) of said tract. Said Tower, Montague, and Wheeler having paid of the purchase-money the sum of twenty-five hundred dollars each, said Sherwood and Woodberry jointly the sum of forty-seven hundred dollars, and said Anfrecht the sum of one thousand dollars. To have and to hold the same to the said Isaac H. Tower, Theodore G. Montague, Xen. Wheeler, Geo. M. Sherwood, Francis Woodberry, and Louis Anfrecht, their heirs and assigns, forever in fee simple. I do covenant with said Isaac Tower, Theodore G. Montague, Xen. Wheeler, Geo. M. Sherwood, Francis Woodberry, and Louis Anfrecht that I am lawfully seized of said property, have a good right to convey it, and that the same is unencumbered.

I do further covenant with said Isaac H. Tower, Theodore G. Montague, Xen Wheeler, Geo. M. Sherwood, Francis Woodberry, and Louis Anfrecht, and their heirs and legal representatives, that
173 I will forever warrant and defend the title thereto against all lawful claims whatever.

Witness my hand and seal this 8th day of April, 1871.

THOS. WEBSTER. [SEAL.]

STATE OF TENNESSEE, *Hamilton County:*

Personally appeared before me, J. H. Hardie, clerk of the county court of said county, Thos. Webster, the within-named bargainor, with whom I am personally acquainted, and who acknowledged that he executed the within instrument for the purposes therein contained.

Witness my hand at office, this 8th day of April, 1871.

J. H. HARDIE, *Clerk.*

STATE OF TENNESSEE, *Hamilton County:*

REGISTER'S OFFICE.

The 10th day of April, 1871, at 10 o'clock a. m., then was the foregoing instrument and certificate received for registration, with thirteen dollars and fifty cents in U. S. revenue stamps attached and cancelled, and is now of record in book "U," pages 221 & 222.

Witness my hand at office, in Chattanooga, the day and date last above written.

JOHN F. HARRILL, *Register,*
Per J. E. DEARING, *D. R.*

174 STATE OF TENNESSEE, *Hamilton County:*

I, H. C. Beck, register of said county, do hereby certify that the foregoing three pages contain a full, true, and correct copy of probate and registration thereof made by Thos. Webster to Isaac H. Tower *et als.* as the same remains of record in my office.

Witness my hand at office, in Chattanooga, this 7th day of July, 1884.

H. C. BECK, *Register.*

Endorsed: Copy of deed. Thos. Webster to Isaac H. Tower *et als.* Exhibit "C" to answer of T. G. Montague *et als.*

(Here follows diagram, marked p. 174.)

175 The separate answer of J. A. Bass to the bill of complaint filed against him and others in the chancery court at Chattanooga by John Swann, John A. Billups, and the State of Alabama, No. 2879, and removed to the circuit court of the United States for the southern division of the eastern district of Tennessee.

This respondent, saving and reserving to himself the benefit of all the usual exception, &c., for answer to so much and such parts of said bill as he is advised it is material for him to answer, answering, says:

That he has no knowledge as to the several allegations in said bill contained of the several acts of the General Assembly of the State of Alabama, the issuance of the bonds named in said bill, and the other proceedings under and by virtue of which compl'ts Swann and Billups claim to hold the title to the land described in the bill as mortgagees.

He can neither admit or deny the truth of said several allegations, and calls upon compl'ts for strict proof of the same, and reserves to himself the right to control the legality of said several acts of
176 the General Assembly of the State of Alabama if such acts were passed as is claimed.

He is advised that the Alabama and Chattanooga Railroad Company did, upon the 2nd day of March, 1878, execute a mortgage, or what purported to be a mortgage, to the State of Alabama embracing certain specific property described in said mortgage, and he presumes said mortgage was registered, as alleged in the bill, but of this he has

no knowledge, and he cannot admit the legality of said mortgage, and calls for full proof and the production of the original mortgage.

He is informed, believes, and so charges, that said alleged mortgage does not cover and embrace the land described in the bill of complaint.

Respondent is informed and believes that the land described in the bill was originally the property of J. P. McMillen, deceased, who sold and conveyed the same by deed to the Alabama and Chattanooga R. R. Company, bearing date March 31st, 1870, nearly
177 a month — the execution of the alleged mortgage to the State of Alabama, and that at the date of said alleged mortgage the Alabama & Chattanooga Railroad Company had no title, legal or equitable, in and to said tract of land.

Respondent is further informed and so believes that the Alabama and Chattanooga Railroad Company, on the 25th day of February, 1871, sold and conveyed said tract of land by deed to respondent Thomas Webster, who in turn sold and conveyed it by deed bearing date April 8, 1871, to respondents T. G. Montague, Xenophon Wheeler, Isaac H. Tower, Louis Aufrecht, G. M. Sherwood, and one Francis Woodbury, since deceased, said Webster and said Montague and his associates having paid at each of said sales a full and valuable consideration for said tract of land, and without notice of any adverse claim to the same, and particularly without any notice of the alleged title of compl'ts, or those under whom they claim.

Respondent further represents that after said Montague, Wheeler, Tower, Aufrecht, Sherwood, and Woodbury made their said
178 purchase they divided up said tract of land, or a part of same, into blocks and lots, laying out streets through the same, as shown by a plat made on exhibit to the answer of respondents Montague and others, and to which reference is here made; and on the 31st day of October, 1872, said Montague and his associates sold and conveyed to one D. F. Blanton, by title-bond of that date, lot No. 16, in block 9, as shown upon said plat, situate on the southwest corner of Baldwin and Patten streets, fronting sixty (60) feet on Baldwin street, and running back of the uniform width of sixty (60) feet southwardly one hundred and ten (110) feet to a ten (10) foot alley, and said Blanton having subsequently paid the entire purchase-money they executed to him a deed for said lot.

Respondent further represents that on the 2nd day of April, 1873, said Montague and his associates sold and conveyed, by title-bond of that date, lot No. 15, in block 9, fronting fifty-five (55) feet on Baldwin street, and running back the uniform width of fifty-five (55) feet southwardly one hundred and ten (110) feet to a ten (10)
179 feet alley to Mrs. Elizabeth Roberts, and she having subsequently paid the entire purchase-money they executed to her a deed for said lot.

Respondent further shows that at the time of the said purchase the vendors were in full possession of said lots with color of title, and the entire consideration for the same was fully paid by said vendees at and before the execution of their respective deeds.

Respondent insists that said vendees were innocent purchasers of their respective lots when they took the equitable, and also when they took the legal, title to said lots; that they paid full and fair considerations for the same without notice or any reasonable grounds from which notice could be presumed or any circumstances which would have placed any reasonable or prudent man upon inquiry of the title which compl'ts, or those from whom they derive title, set up to the tract of land of which these lots form a part, and he relies upon the plea of an innocent purchaser.

Respondent further represents that at once upon the purchase of said lots by said Blanton and Elizabeth Roberts *of their said*
180 *lots* they entered upon the possession of the same, and each enclosed tho lot purchased by him and her with a good and substantial fence, and in the year 1872 said Blanton erected a house upon the lot purchased by him, which he and those claiming under him have occupied and possessed continuously ever since. The lot purchased by Mrs. Roberts has remained enclosed by a fence since the date of her purchase.

Respondent charges that the possession of said Blanton and of said Elizabeth Roberts of the lots respectively purchased by them ever since their said purchases was visible, exclusive, actual, notorious, adverse, and continuous for more than seven years next preceding the commencing of this action, and he, as their assignee, pleads and relies upon the statute of seven years as a complete and perfect bar to the recovery of compl'ts as to said lots.

Respondent further represents that in the month of ——, 1883, he bought from said D. F. Blanton the lot so purchased by him, and in the month of April, 1884, he purchased of said Elizabeth Roberts the lot purchased by her as aforesaid, paying to the vendors a full and fair consideration therefor and taking deeds
181 for the same, and he is now in the possession of said lots claiming the fee therein.

This respondent alsc refers to the several defences, allegations, and charges made in the answer of T. G. Montague, Xen. Wheeler, J. H. Tower, G. M. Sherwood, and Chas. J. Woodbury, and adopts the same and makes them a part of this answer as if here particularly set forth, and he relies upon the same as matters of defence on his behalf.

As to the remainder of the tract described in the bill of complaint respondent is not in possession of the same, or any part of it, nor does he claim any part of said tract except the lots heretofore described, nor is he exercising any acts of ownership over the remainder of said tract, or any part of the same.

And now having fully answered all the allegations of said bill of complaint that he is advised it is material for him to answer, he prays to be hence dismissed, with his reasonable costs, &c.

J. A. BASS.

WHEELER & MARSHALL, *Solicitors.*

Endorsed: In equity. No. 73. In the U. S. circuit court
182 for the southern division of the eastern district of Tenn

State of Alabama *et als. vs.* Theo. G. Montague *et als.* Answer of J. A. Bass. Filed Aug. 1, 1884. A. R. Humes, clerk, U. S. Cir. C't.

The separate answer of Marion Carlile to the bill of complaint filed against her and others in the chancery court at Chattanooga by John Swann, J. A. Billups, and the State of Alabama, No. 2879, and removed to the circuit court of the United States for the southern division of the eastern district of Tennessee.

This respondent, saving and reserving for herself the benefit of all the usual exceptions, &c., for answer to so much and parts of said bill as she is advised it is necessary for her to answer, answering, says:

That she has no knowledge as to the several allegations in said bill contained of the several acts of the General Assembly of the State of Alabama, the issuance of the bonds named in said bill, and the other proceedings, by virtue of which compl'ts, Swann and Billups, claim to hold the title to the land described in the bill as mortagees.

183 She can neither admit *or* deny the truth of said several allegations, and calls upon compl'ts for strict proof of the same, and she reserves to herself the right to contest the legality of said several acts of the General Assembly of the State of Alabama, if such acts were ever passed as is claimed.

She is advised that the Alabama & Chattanooga Railroad Co. did, upon the 2nd day of March, 1870, execute a mortgage, or what purported to be a mortgage, to the State of Alabama, covering certain property belonging to it, and she presumes the same was registered as alleged in the bill, but of this she has no knowledge, and she cannot admit the legality of said mortgage, and calls for full proof, and the production of the original mortgage.

She is informed and believes and so charges that said alleged mortgage does not cover and embrace the land mentioned and described in the bill of complaint.

Respondent is informed and believes that the tract of land described in the bill was originally the property of J. P. McMillin, who sold and conveyed the same by deed to the Alabama &

184 Chattanooga R. R. Company, — had no title legal or equitable in and to said tract of land.

Respondent is further informed, and so believes that the Alabama & Chattanooga R.R. Co., on the 25th day of February, 1871, sold and conveyed said tract of land to respondent, Thomas Webster, who in turn sold and conveyed it by deed bearing date April 8, 1871, to respondents, T. G. Montague, Xenophon Wheeler, Isaac H. Tower, Louis Anfrecht, S. M. Sherwood, and one Francis Woodbury, since deceased, said Webster and said Montague and his associates having paid at each of said sales a full and valuable consideration for said tract of land, and without notice of any adverse claim to the same, and particularly without any notice of the alleged title of compl'ts or those under whom they claim.

Respondent further represents that after said Montague, Wheeler, Tower, Anfrecht, Sherwood & Woodbury made their said purchase

they divided up said tract or a part of same, into blocks and lots, laying out streets through the same as shown upon
185 plat made on exhibit to the answer of respondents, Montague and others, filed in this cause, and to which reference is here made, and on the 24th day of April, 1872, T. J. Carlile, the husband of this respondent, purchased from said Montague, Wheeler, Tower, Anfrecht, Sherwood, and Woodbury, a lot in block No. 6, as shown upon said plat and described in the deed from said Montague and others to said T. J. Carlile of said date, as beginning at the rock corner of Thos. McMillin's one-acre tract, running thence west with the south line of Henry street 50 feet to a stake, fronting 50 feet on Henry street, and running back of the uniform width of 50 feet southwardly 150 feet to a ten-feet alley.

At the time of the purchase by said T. J. Carlile the vendors were in full possession of said lot under color of title, and the entire consideration was paid by said T. J. Carlile upon the day the deed bears date, to wit, the sum of three hundred & fifty dollars.

Respondent insists and charges that said T. J. Carlile was an innocent purchaser of said lot when he took the legal title to the same; that he paid the consideration named in the deed in good
186 faith, without notice or any reasonable grounds from which notice could be presumed, or any circumstances which would have placed any reasonable or prudent man upon inquiry of the title which compl'ts, or those from whom they derive title, set up to the land of which this lot forms a part.

Respondent would further show that on the 29th day of Oct., 1878, said T. J. Carlile departed this life testate, leaving a last will and testament, by the provisions of which respondent was made sole devisee of all his estate, both real and personal, including the lot above described, of which he was seized and possessed at the date of his death. Said will and testament was duly probated in the county court of Hamilton county, and this respondent is sole owner of said lot.

This respondent here refers to the several defences, allegations, and charges made in the answer of her codefendants, T. G. Montague, Xen. Wheeler, I. H. Tower, G. M. Sherwood, & Chas. J. Woodbury, and adopts the same and makes them a part of her an-
187 swer, as if here particularly set forth, and relies upon the same as matters of defense on her behalf.

As to the remainder of the tract described in the bill of complaint, respondent is not in possession of the same nor does she claim any part of said tract except the lot heretofore described, nor is she exercising any acts of ownership over the remainder of said tract.

And now, having fully answered all the allegations of said bill which she is advised it is natural for her to answer, she prays to be hence dismissed, with her reasonable costs.

MARION A. CARLILE.

WHEELER & MARSHALL,
Solicitors.

Endorsed: In equity. No. 73. In the United States circuit court

for the southern division of the eastern district of Tennessee. The State of Alabama *et als. vs.* Theo. G. Montague, *et als.* Answer of Marion Carlile. Filed Aug. 2, 1884. W. G. McAdoo, Jr., deputy clerk.

188 The separate answer of Samuel Worthy to the bill of complaint filed against him and others by the State of Alabama, John Swann, and John A. Billups in the chancery court of Chattanooga, Tennessee, which cause has been moved to the circuit court of the United States for the southern district of the eastern district of Tennessee.

This respondent, saving and reserving to himself the benefits of all the usual exceptions, &c., for answer to so much and such parts of said bill as he is advised it is material and necessary for him to answer, answering, says:

That he has no knowledge as to the several allegations in said bill contained of the several acts of the General Assembly of the State of Alabama, the issuance of the bonds named in said bill, and the other proceedings under and by virtue of which compl'ts, Swann and Billups, claim to hold the title to the land described in the bill as mortgagees.

189 He can neither admit or deny the truth of the allegations of the bill in these respects and calls upon compl'ts for strict proof of the same, and he reserves to himself the right to contest the legality of said several acts of the General Assembly of the State of Alabama, if such acts were passed, as is claimed. He is advised that the Alabama and Chattanooga Railroad Company did upon the 2nd day of March, 1878, execute a mortgage, or what purported to be a mortgage, to the State of Alabama, embracing certain specific property described in the mortgage, and he presumes said mortgage was registered, as alleged in the bill; but of this he has no knowledge, and he can neither admit or deny the legality of said mortgage, and he calls for full proof and the production of the original mortgage.

He is informed, believes, and so charges, that said alleged mortgage does not cover or embrace the land described in the bill of complaint.

190 This respondent refers to the several defences, allegations, and charges contained in the answer of his co-respondents, T. G. Montague, Xen. Wheeler, I. H. Tower, G. M. Sherwood, & Charles J. Woodbury, and hereby adopts the same as matters of defence in his behalf.

Respondent is informed and believes that the land described in the bill was originally the property of J. P. McMullen, deceased, who sold and conveyed the same to the Alabama and Chattanooga Railroad Company by deed bearing date March 31st, 1878, nearly a month after the date of the alleged mortgage to the State of Alabama, and that at the date of the alleged mortgage the Alabama & Chattanooga Railroad Company had no title, legal or equitable, in and to said tract of land.

Respondent is further informed and believes that the Alabama

and Chattanooga Railroad Company, on the 25th day of February, 1871, sold and conveyed said tract of land to respondent Thomas Webster, who in turn sold and conveyed it by deed bearing date April 8, 1871, to respondents T. G. Montague, Xen. Wheeler, Isaac H. Tower, Geo. M. Sherwood, Louis Aufrecht, and Francis Woodbury, since deceased, said Webster and said Montague and his
191 associates having paid at each of said sales a full and valuable consideration for said tract of land and without any notice of any adverse claim to the same, and particularly without any notice of the alleged title of compl'ts or those under whom they claim.

Respondent is further informed and believes that after said Montague, Wheeler, Tower, Aufrecht, Sherwood, and Woodbury made their said purchase they divided up a portion of said tract into blocks and lots, laying out streets through the tract, as shown upon a plat made an exhibit to the answer in this cause of Montague and others, filed in this cause, and to which reference is here made; and on the 7th day of May, 1872, Mattie Worthy, then the wife of this respondent, purchased from said Montague, Wheeler, Tower, Aufrecht, Sherwood, and Woodbury a lot, numbered lot 2, block 4, as shown upon said plat, fronting 50 feet on Weaver street and running back eastwardly, of the uniform width of 50 feet, 105 feet to an alley, and a bond for title, of the date aforesaid, was executed to said Mattie Worthy by the vendors, and subsequently said
192 Mattie Worthy, having paid the entire consideration for said lot, they executed to her a deed for same.

Respondent further represents that at the time of the purchase by Mattie Worthy of said lot, and at the date of the bond for title and at the date of said deed, the vendors were in full possession of said lot, under color of title, and respondents insists that Mattie Worthy was an innocent purchaser of said lot when she took the equitable and when she took the legal title to the same; that she paid the purchase-money for the same in good faith, without notice or any reasonable grounds from which notice could be presumed, or any circumstances which would have placed any reasonable or prudent person upon inquiry of the title which compl'ts, or either of them, set up to the lands of which this lot forms a part, and respondent relies upon the plea of an innocent purchaser.

Respondent further represents that immediately after the purchase of said lot by Mattie Worthy, and in the summer of 1872, she enclosed said lot with a fence and built upon the lot a frame
193 house and took possession of the same in said year, where she continued to reside with this respondent until her death, in the year 1881, having, before her death, first made a last will and testament, in which she devised said house and lot to this respondent, who has remained in possession of the same continuously ever since, and is still living upon said lot.

Respondent insists that the possession of said lot of Mattie Worthy and himself, as her husband, and his possession since her death, from the year 1872 until the present time, has been visible, exclusive, actual, notorious, adverse, and continuous for more than seven years next preceding the commencement of this action, and he pleads and

relies upon the statute of seven years as a complete and perfect bar to the recovery of compl'ts as to said lot.

As to the remainder of the tract described in the bill of complaint, respondent is not in possession of the [tract] or any part of it, nor does he claim any part of it, except the tract heretofore described, nor is he exercising any acts of ownership over the remain-
194 der of said tract, or any part of the same.

And now, having fully answered all the allegations of said bill that he is advised that it is necessary or material for him to answer, he prays to be hence dismissed with his reasonable costs, &c.

WHEELER & MARSHALL, *Solicitors.*
SAM'L H. WORTHY.

Endorsed: In equity. No. 73. In the United States circuit court for the southern division of the eastern district of Tennessee. State of Alabama *et als. vs.* Theodore G. Montague *et als.* Answer of Sam'l Worthy. Filed July 9th, 1884. W. G. McAdoo, Jr., deputy clerk.

The separate answer of Jacob Kauber to the bill of complaint filed against him and others by the State of Alabama, John Swann, and John A. Billups, in the chancery court of Chattanooga, Tennessee, which cause has been removed to the circuit court of the United States for the southern division of the eastern district of Tennessee.

195 This respondent, saving and reserving to himself the benefits of all the usual exceptions, &c., for answer to so much and such facts of said bill as he is advised it is material and necessary for him to answer, answering, says:

That he has no knowledge as to the several allegations in said bill contained; of the several acts of the General Assembly of the State of Alabama, the issuance of the bonds named in said bill, and the other proceedings under and by virtue of which compl'ts, Swann and Billups, claim to hold the title to the land described in the bill as mortgagees.

He can neither admit or deny the truth of the allegations of the bill in these respects, and calls upon compl'ts for strict proof of the same, and he reserves to himself the right to contest the legality of said several acts of the General Assembly of the State of Alabama, if such acts were passed, as is claimed.

He is advised that the Alabama and Chattanooga Company did, upon the 2nd day of March, 1878, execute a mortgage, or what purported to be a mortgage, to the State of Alabama, embracing certain specific property described in the mortgage, and he presumes
196 said mortgage was registered, as alleged in the bill; but of this he has no knowledge, and he can neither admit or deny the legality of said mortgage, and he calls for full proof and the production of the original mortgage.

He is informed, believes, and so charges that said alleged mortgage does not cover the land described in the bill of complaint.

This respondent refers to the several defences, allegations, and charges contained in the answer of his co-respondents, T. G. Mon-

tague, Xen. Wheeler, I. H. Tower, G. M. Sherwood, & Charles J. Woodbury, and hereby adopts the same, and makes them a part of this answer, as if here particularly set forth; and he relies upon the same as matters of defence in his behalf.

Respondent is informed and believes that the land described in the bill was originally the property of J. P. McMillen, deceased, who sold and conveyed the same to the Alabama and Chattanooga Railroad Company, by deed bearing date March 31st, 1870, nearly a month after the date of the alleged mortgage to the State of Alabama, and that at the date of the alleged mortgage the Ala-
197 bama & Chattanooga Railroad Company had no title, legal or equitable, in and to said tract of land.

Respondent is further informed and believes that the Alabama & Chattanooga R. R. Co. on the 25th day of February, 1871, sold and conveyed said tract of land to respondent, Thomas Webster, who in turn sold and conveyed it by deed bearing date April 8, 1871, respondents, T. G. Montague, Xen. Wheeler, Isaac H. Tower, Geo. M. Sherwood, Lewis Aufrecht, and Francis Woodbury, since deceased, said Webster and said Montague and his associates, having paid at each of said sales a full and valuable consideration for said tract of land and without any notice of any adverse claim to the same, and particularly without any notice of the alleged title of compl'ts or those under whom they claim.

Respondent is further informed and believes that after said Montague, Wheeler, Tower, Aufrecht, Sherwood, and Woodbury, made their said purchase they divided up a portion of said tract into blocks and lots, laying out streets through the tract as shown upon a plat made on exhibit to the answer in this cause of Montague and
198 others filed in this cause and to which reference is here made and on the 22 day of July, 1871, respondent purchased from said Montague, Wheeler, Tower, Aufrecht, Sherwood, and Woodbury, one of said lots numbered on said plat as lot 1 in block 1, and paid the purchase money therefore and received a deed to said lot from said vendors, and on the 2nd day of February, 1872, he purchased two other lots in same block numbered 2 & 3, paying the purchase money therefor, and received from the vendors a deed for the same.

Respondent further represents that at the time of the purchase by him of said lot and at the date of said deeds, the vendors were in full possession of said lots under color of title, and respondent charges that he was an innocent purchaser of said lot when he took the equitable and also when he took the legal title to the same, that he paid the purchase money for the same in good faith without notice or any reasonable grounds from which notice could be presumed or any circumstance which would have placed any reasonable
199 or prudent person upon inquiry of the title which compl'ts or either of them set up to the land of which this lot forms a part, and respondent relies upon the plea of an innocent purchaser.

As to the remainder of the tract described in the bill of complaint, respondent is not in possession of the same or any part of it, nor does he claim any part of it, except the tract heretofore described, nor is

he exercising any acts of ownership over the remainder of said tract or any part of the same.

And now having fully answered all the allegations of said bill, that he is advised it is necessary or material for him to answer, he prays to be hence dismissed with his reasonable costs, &c.

WHEELER & MARSHALL,
Solicitors.

JACOB KAUBER,
By WHEELER & MARSHALL,
His Solicitors.

Endorsed: In equity. No. —. In the U. S. circuit court for the southern division of the eastern district of Tennessee. State of Alabama *et al. vs.* Theo. G. Montague *et als.* Answer of Jacob Kauber. Filed Aug. 1, 1884. A. K. Humes, clerk U. S. cir. c't.

200 The separate answer of G. C. Reinhardt to the bill of complaint filed against him and others by the State of Alabama, John Swann, and John A. Billups in the chancery court at Chattanooga, Tennessee, and which has been removed to the circuit court of the United States for the southern division of the eastern district of Tennessee.

This defendant saving and reserving to himself the benefit of all the usual exceptions, &c., for answer to so much and such parts of said bill, as he is advised it is material and necessary for him to answer, answering says: That he has no knowledge as to the several allegations in said bill contained of the several acts of the General Assembly of the State of Alabama, the issuance of bonds named in said bill and the other proceedings, under and by virtue of which compl'ts Swann and Billups claim to hold the title to the land described in the bill as mortgages.

He can neither admit or deny the truth of said several alle-
201 gations, and calls upom compl'ts for strict proof of the same, and reserves to himself the right to contest the legality of said several acts of the General Assembly of the State of Alabama, if such acts were passed as is claimed.

He is advised that the Alabama & Chattanooga R. R. Company did upon the 2nd March, 1870, execute a mortgage, or what purported to be a mortgage, to the State of Alabama, including certain specific property described in the mortgage, and he presumes said mortgage was duly registered as alleged in the bill, but of this he has no knowledge, and can neither admit or deny the legality of said mortgage, and he calls for full proof and the production of the original mortgage.

He is informed, believes, and so charges, that said mortgage does not cover or include the land described in the bill, and he here refers to the several defences, allegations, and charges contained in the answer of his co-respondents, T. G. Montague, Xen. Wheeler, I. H. Tower, G. M. Sherwood, and Chas. J. Woodbury, and hereby adopts the same and makes them a part of this answer upon this
202 point, as if here particularly set forth, and he relies upon the same as matters of defence in his behalf.

Respondent is informed and believes that the land described in the bill originally belonged to one J. P. McMillin, now deceased, who sold and conveyed the same to the Alabama and Chattanooga R. R. Co. by deed bearing date March 31st, 1870, nearly a month after the date of the alleged mortgage, to the State of Alabama, and that at the date of said mortgage the Alabama & Chattanooga R. R. Co. had no title, legal or equitable, in and to said tract of land.

Respondent is further informed and believes that the Alabama & Chattanooga R. R. Co. on the 25th day of February, 1871, sold and conveyed said tract of land by deed of that date to respondent, Thos. Webster, who in turn sold and conveyed it by deed bearing date April 8, 1871, to T. G. Montague, Xen. Wheeler, I. H. Tower, Geo. M. Sherwood, Louis Aufrecht, and one Francis Woodbury, since deceased, said Webster and said Montague and his associates
203 having paid at each of said sales a full and valuable consideration for said tract of land and without any notice of any adverse claim to the same, and particularly without any notice of the alleged title of the compl'ts or either of them to said tract.

Respondent is further informed and he believes that, after said Montague, Wheeler, Tower, Anfrecht, Sherwood, and Woodbury made their said purchase, they divided up a portion of said tract into blocks and lots, laying out streets through the tract, as shown upon a plat made on exhibit to the answer in this cause of Montague and others, and on the 3rd day of May, 1872, they sold one of the lots shown on said plat, and described as lot 1, block 4, fronting 55 feet on Weaver street, and running back eastwardly of the uniform width of 55 feet, 105 feet to an alley, to one Mrs. Anna Cole, to whom they executed a bond for title, bearing date May 3, 1872, and subsequently she having paid the entire purchase-money they executed to her a deed to said lot.

Respondent further represents that on the 4th day of May,
204 1872, said Montague and his associates sold and conveyed by title bond of that date to one Mrs. Maria A. Shelley another lot, numbered on said plat as lot No. 8, block 5, fronting 55 feet on Weaver street, and running back eastwardly of the uniform width of 55 feet 105 feet to any alley, and subsequently she having paid the entire purchase-money they executed to her a deed to said lot.

Both of said lots, by mesne conveyances, have passed into the hands and possession of this defendant, who holds deeds to said lots from parties in possession when they were executed, and he insists that he is an innocent purchaser of said lots, paying a full and valuable consideration for the same without any notice, or any reasonable grounds from which notice could be presumed, or any circumstances which would have placed any prudent or cautious person upon inquiry of the title which compl'ts, or either of them, now set up to the land of which these lots form parts. And he further represents that when Anna Cole and Maria P. Shelly purchased
205 said lots the vendors were in full possession of the same, claiming title thereto; that they paid full and valuable considerations therefor, without any notice or any reasonable grounds from which notice could be presumed, or any circumstances which would

have placed any prudent or cautious person upon inquiry as to the claim which compl'ts, or either of them, had to the land of which the lots in question form parts, and this defendant relies upon the plea of innocent purchaser.

Respondent further represents that after the purchase of said lots by Anna Cole and Maria P. Shelly, and during the year 1872, they each of them went into the possession of the lots respectively purchased by them, enclosed the same with fences, and each built on her own lot a dwelling-house during the year, and each occupied her own house until she sold and conveyed the same, and each of said lots has been occupied by its owners or by tenants from the year 1872 until the present time continuously.

206 Defendant insists that the possession of said lots under deeds from parties in possession from the year 1872 has been visible, exclusive, actual, notorious, adverse to compl'ts, and continuous for more than seven years next preceding the commencement of this action, and he pleads and relies upon the statute of seven years as a complete and perfect bar to the recovery of the compl'ts as to said lots.

As to the remainder of the tract described in the bill respondent is not in possession of the same, or any part of it, nor does he claim any part of it except the lots heretofore described, nor is he exercising any acts of ownership over the remainder of said tract, or any part of it.

And now, having fully answered all the allegations of said bill that he is advised it is material for him to answer, he prays to be hence dismissed, with his reasonable costs. &c.

G. C. RHINEHARD.

WHEELER & MARSHALL, *Solicitors.*

Endorsed: In equity. No. —. In the U. S. circuit court for the southern division of the eastern district of Tennessee. State of Alabama *et als. vs.* Theo. G. Montague *et als.* Answer of G. C. Rhinehard. Filed August 1, 1884. A. R. Humes, clerk U. S. cir. court.

207 The seperate answer of Jacob Peyer to the bill of complainant filed against him and others by the State of Alabama, John Swann, & John A. Billups in the chancery court at Chattanooga, Tennessee, and which have been removed to the circuit court of the United States for the southern division of the eastern district of Tennessee.

This defendant, saving and reserving to himself the benefit of all the several exceptions, &c., for answer to so much and such parts of said bill as *they are* advised it is material and necessary for *them* to answer, answering, says:

That he has no knowledge as to the several allegations in said bill contained of the several acts of the General Assembly of the State of Alabama, the issuance of the bonds named in said bill, and the other proceedings, under and by virtue of which compl'ts, Swann and Billups, claim to hold the title to the land described in the bill as assignees of the mortagages.

He can neither admit -or deny the truth of said several al-
208 legations, and calls upon compl'ts for strict proof of the same, and reserves the right to contest the legality of said several acts of the General Assembly of the State of Alabama, if said acts were passed, as is alleged.

He is advised that the Alabama and Chattanooga R. R. Company did, upon the 2nd March, 1870, execute a mortgage, or what purported to be a mortgage, to the State of Alabama, including certain specific property described in the mortgage, and he presumes said mortgage was duly registered as alleged in the bill, but of this he has no knowledge, and can neither admit -or deny the legality of said mortgage, and he calls for full proof and the production of the original mortgage.

He is informed, believes, and so charges that said mortgage does not cover or include the land described in the bill, and he here refers to the several defences, allegations, and charges contained in the answer of his codefendants, T. G. Montague, Xen. Wheeler, I. H. Tower, G. M. Sherwood, and Chas. J. Woodbury, and he hereby
209 adopts said defences, allegations, and charges, and makes them a part of this answer upon this point, and he relies upon the same as matters of defence in his behalf.

Defendant is informed and believes that the land described in the bill originally belonged to one J. P. McMillin, now deceased, who sold and conveyed the same to the Alabama & Chattanooga R. R. Co. by deed bearing date March 31st, 1870, nearly a month after the date of the alleged mortgage to the State of Alabama, and that at the date of the said mortgage the Alabama & Chattanooga R. R. Co. had no title, legal or equitable, in and to said tract of land.

Defendant is further informed and believes that the Alabama & Chattanooga R. R. Co., on the 25th day of Feb'ry, 1871, sold and conveyed said tract of land by deed of that date to defendant, Thomas Webster, who, in turn, sold and conveyed it by deed, bearing date April 8, 1871, to T. G. Montague, Xen. Wheeler, I. H. Tower, Louis Anfecht, G. M. Shewood, & Francis Woodbury, since deceased, said Webster and said Montague and his associates having
210 paid at each of said sales a full and valuable consideration for said tract of land, and without any notice of any adverse claim to the same, and particularly without any notice of the alleged title of the compl'ts, or either of them, to said tract.

Defendant further represents that after said Montague, Wheeler, Tower, Anfecht, Sherwood, & Woodbury made their said purchase they divided up a portion of said tract into blocks and lots, laying out streets through the tract, as shown upon a plat made an exhibit to the answer of Montague & others in this cause, and on the 4th day of May, 1871, they sold and conveyed one of the lots shown on said plat and described as lot 1, block 9, fronting 60 feet on Fisher street, and running back eastwardly of the uniform width of 60 feet 105 feet to an alley to one Harriet E. Ganabrant for the consideration of $300.00, and on said 4th May, 1871, the vendors executed to her a deed, the entire purchase-money being paid.

Defendant further represents that at the time of the purchase of

said lot by Harriet E. Ganabant the execution of said bond
211 for title the vendors were in full possession of said lot, claiming title thereto, and defendant insists that when she purchased she was an innocent purchaser for a valuable consideration; that she purchased in good faith, without notice, or any reasonable grounds from which [notice] could be presumed, or any circumstances which would have placed any prudent or cautious person upon inquiry of the title which compl'ts, or either of them, set up to the land of which this lot forms a part.

After her said purchase and after she received her deed, and on the 25 day of Sept., 1880, said Harriet E. Garrabrant sold and conveyed by deed said lot to this defendant, who in like manner was an innocent purchaser of said lot, having no notice, or any grounds from which notice could be presumed, of any adverse title to said lot, and he sets up and relies upon the plea of an innocent purchaser as to said Harriet E. Garrabrant and himself as a defence to the recovery of compl'ts as to this lot.

Defendant further represents that after the purchase of said
212 lot by said Harriet E. Garrabrant, and during the year 1872, she entered upon the possession of said lot, enclosed the same with a fence, built thereon a dwelling-house, and lived in the same until her sale to this defendant, and since his purchase the premises have been continuously occupied by this defendant through tenants, and said lot has remained continuously in the actual possession and occupation of said Harriet E. Garrabrant and this respondent, claiming title thereto since the year 1872.

Defendant represents that the possession of said lot from the year 1872 by said Harriet E. Garrabrant and himself up to the present time has been visible, exclusive, actual, notorious, adverse to compl'ts, and continuous for more than seven years next preceding the commencement of this action, and defendant pleads and relies upon the statute of seven years as a complete and perfect bar to the recovery of compl'ts in this suit as to said lot.

As to the remainder of the tract described in the bill of complaint,
213 this defendant is not in the possession of the same, or any part thereof, nor does he claim any portion of said tract, except the lot described, nor is he exercising any acts of ownership over the remainder of the tract, or any part of it.

And now having fully answered all the allegations of said bill that he is advised it is material for him to answer, he prays to be hence dismissed with his reasonable costs, &c.

JACOB PEYER.

WHEELER & MARSHALL,
Solicitors.

Endorsed: In equity. No. 73. In the United States circuit court for the southern division of the eastern district of Tennessee. State of Alabama *et als. vs.* Theodore G. Montague *et als.* Answer of Jacob Peyer. Filed July 9th, 1884. W. G. McAdoo, Jr., deputy clerk.

The joint and separate answer of J. P. McMillin and D. C. McMillin, Jr., to the bill of complaint filed against them and others by the

State of Alabama, John Swann, and John A. Billups, in the chancery court at Chattanooga, Tennessee, and which has been removed to the circuit court of the United States for the
214 southern division of the eastern district of Tennessee.

These respondents, saving and reserving to themselves the benefit of all the usual exceptions, &c., for answer to so much and such parts of said bill as they are advised it is necessary and material for them to answer, answering say:

That, as they are advised and believe, they have no interest, directly or indirectly, in the results of this litigation. They claim no interest whatever in the land described in the bill or any part of it.

Said land at one time was owned by their father, J. P. McMillin, now deceased. He sold the same in the early part of 1869, and received at the time of the sale a part of the purchase-money. They remember hearing their said father speak of making the sale at the time the same was effected, and hearing from him that he had made the sale to one J. C. Stanton, who at that time was superintendent of the Alabama & Chattanooga R. R., then in process of construction, but whether said said sale was made to Stanton as an
215 individual or as an officer of said railroad company these respondents do not know. Their said father died in the month of May, 1882, leaving a last will and testament, and these respondents were in said will nominated as the executors of said will, and have qualified as such. At the request of some of the respondents in this cause, they have made diligent search among their late father's papers to find if possible the title bond their father may have given at the time of the sales and taken up at the time he executed the deed in 1871, if, indeed, anything more than a receipt for the $3,000.00 paid at the date of the purchase was ever given; but they have been unable to find any such bond, though their father was one of the most particular of men about preserving papers, and they have been unable to find any memorandum which throws any light upon the question as to whom the title bond was executed, if indeed any was executed at all, or by whom the money was paid.

They further represent that on the 31st day of March,
216 1870, their said father, as appears from the deed he made at the time, received the balance of the purchase-money for said tract of land, and executed his deed to the Alabama & Chattanooga R. R. Company, and this terminated his connection with said tract of land, and these respondents have no interest in said land.

And now, having fully answered all the allegations of said bill that they are advised it is necessary for them to answer, they pray to be hence dismissed with their reasonable costs, &c.

JAS. P. McMILLIN,
D. C. McMILLIN, JR.

Endorsed: In Equity. No. —. In the U. S. circuit court for the southern division of the eastern district of Tennessee. State of Alabama *et als. vs.* Theo. G. Montague *et als.* Answer of D. C. & J. P. McMillin. Filed Aug. 1, 1884. A. R. Humes, clerk U. S. cir. c't.

In the Circuit Court for the Southern Division of the Eastern
217 District of Tennessee.

JOHN SWANN, JOHN A. BILLUPS, & STATE OF ALABAMA
vs.
T. G. MONTAGUE *et als.*

The replication of the said complainants to the answers of the defendants, T. G. Montague, Xenophon Wheeler, G. M. Sherwood, Isaac H. Tower, Charles J. Woodbury, Sam'l Worthy, Jacob Peyer, D. C. & J. P. McMillin, Jacob Kuber, G. C. Rhinehard, J. N. Bass, & Marion Carlile:

These replicants, the State of Alabama, John Swann, & John A. Billups, trustees, &c., saving and reserving to themselves all and all manner of advantage of exception to the manifold insufficiencies to the said answers for replication thereto sayeth: That they will aver and prove their said bill to be true, certain, and sufficient in law to be answered unto, and that the said answers of said defendants are uncertain, untrue, and insufficient to be replied to by these repliants; without this, that any other matter or thing whatsoever in the said answers contained, material or effectual, in the law to be replied to, confessed, and avoided, traversed or denied, is true.

All of which matters and things these repliants are and will be ready to aver and prove, as this hon. court shall direct,
218 and humbly pray, as in and by their said bill they have already prayed.

SAM'L F. RICE AND
PHELAN & GOREE,
Sols. for Compl'ts.

Endorsed: In equity. No. 73. In the United States circuit court for the southern division of the eastern district of Tennessee. The State of Alabama *et als. vs.* Theo. G. Montague *et als.* Replication. Filed Aug. 4, 1884. A. R. Humes, clerk U. S. C't C't.

Depositions of John C. Stanton, Jr., Wm. P. Drake, Jeremiah Richards, Frederick Wolffe, and John Swann.

In the United States Circuit Court for the Southern Division of the Eastern District of Tennessee. In Equity.

THE STATE OF ALABAMA *et als. vs.* THEO. G. MONTAGUE *et als.*

219 Witnesses for plaintiff in the above case taken upon notice on the 27th day of August, 1884, in the presence of the plaintiffs and defendants, by their attorneys; that is to say, D. J. Duffy, agent, appearing for plaintiffs, and Xenophon Wheeler, attorney, appearing for defendants.

Said John C. Stanton, Sr., being first duly sworn by the commissioners, doth depose as follows:

Mr. DUFFY: What is your age, occupation, and residence at the present time?

Ans. My age is sixty-four; I am a contractor; my residence is the city of New York.

Mr. DUFFY: State if at any time you are in any way connected with a railroad formerly known as the Alabama and Chattanooga railroad, running from Chattanooga, in the State of Tennessee, through the State of Alabama to Meridian, in the State of Miss. If you answer you were connected with such a road, state how long you were connected, what position or positions you held during that time, if any; where your principal place or office of business, if any, was located, and especially if you had any connection with such a road during the years 1869, 1878, & 1871, and what connection; answer fully.

220 Answer. I was connected with that road. I acted as superintendent; I was the superintendent. I think I commenced with the company about 1868, and was superintendent till 1871. The company's general office was in Chattanooga, Tennessee, as far as my department was concerned.

Mr. DUFFY: State whether or not you were at the company's general office in Chattanooga during said period, the greater portion of the time as its superintendent.

Ans. Well, I made headquarters there. I can't say I was there most of the time; I may have been there most of the time. I don't remember. I was there a good deal of the time.

Mr. DUFFY: State by what power or authority you occupied the position of the superintendent of the Alabama & Chattanooga railroad.

Ans. I was appointed by the board of directors as such.

Mr. DUFFY: If you have any paper writing of your appointment and authority as such superintendent, please file herewith and make it a part of your answer—a copy of such paper writing.

Ans. I have some paper from the directors, but where it is

221 now I don't know; it may be among my papers.

Mr. DUFFY: Please state when you last saw such paper writing.

Ans. I don't remember.

Mr. DUFFY: If you say you had such a paper, and have not got it in your possession, tell, if you know, where it is.

Ans. I have not said it was not in my possession; I said I did not know whether it was among my papers or not.

Mr. DUFFY: Will you please make search for such paper writing among your papers?

Ans. No; I won't.

Mr. DUFFY: Please state in substance what the paper contained, and your powers thereunder.

Ans. My recollection [is] that I was empowered by the board of directors to transact all business connected with the Alabama & Chattanooga Railroad Company in the South.

Mr. DUFFY: You say you will not make search for the papers asked for?

Ans. My papers are scattered. There are not very many of them in New York. I have a great many old papers, and I put them to-

gether & boxed them up; they are in quite a good many
222 boxes. I would not know where to look for that paper. If I could find it I would have no objection to their having it.

Mr. DUFFY: You do not know that said paper is with your other papers in New York, so that we can have it on this examination?

Ans. I don't know that. I will look at my papers in New York and see if it is there.

Mr. DUFFY: If in New York, upon examination of your papers, you find the paper referred to, will you please file it with your deposition?

Ans. I will file a certified copy.

Mr. DUFFY: State if, during the year 1869, you purchased in the city of Chattanooga, Tenn., any lands from J. P. McMillin for the A. & C. Railroad Company?

Ans. I bought some lands from Mr. McMillin in the name of the Alabama & Chattanooga Railroad Company.

Mr. DUFFY: Is this the same property known as the Spring property?

Ans. Yes, sir.

Mr. DUFFY: Please state whether or not the A. & C. Rail-
223 road Company paid Mr. McMillin for said property?

Ans. I have no doubt they did. I did not pay the money myself.

Mr. DUFFY: Please state, if you know, where the deed from McMillin to said railroad company is at the present time.

Ans. I do not know.

Mr. DUFFY: Was or is it in your possession?

Ans. I think it never was in my possession.

Mr. DUFFY: Do you know in whose possession it is?

Ans. I do not.

Mr. DUFFY: Please state if, during the year 1871, as the general superintendent of said railroad company, under your authority from the board of directors, you sold to Thomas Webster, of Chattanooga, Tenn., the property purchased by the A. & C. Railroad Company from J. P. McMillin?

Ans. I sold Mr. Webster the land to pay a bill which the company owed him for supplies, such as repairing engines, cars, and such work.

Mr. DUFFY: Please state if you made such sale as the general superintendent of said railroad company, under your power
224 as such superintendent herein above referred to, and of which you say you will produce a certified copy, if to be found among your papers in New York; and please examine the certified copy of the deed to said Webster, herewith handed to you, and say if the same is in substance a copy of the same, and make the same an Exhibit "A" as part of your answer.

Ans. I not only acted as superintendent, but I acted as general agent to transact all business connected with the Alabama and Chattanooga Railroad Company in the South. I sold the said land as

superintendent or agent of said railroad company. I think the said certified copy of said deed a correct copy.

Mr. DUFFY: Does your general power of attorney, or direction, resolution, or vote of the board of directors hereinbefore referred to, give you full power to act as their general superintendent and agent?

Ans. If the power of attorney referred to did not give me power for doing everthing that I did do, I think the board of directors authorized me to transact all business connected with that company which I did transact.

225 Mr. DUFFY: Did you have any other paper writing outside of your power of attorney?

Ans. My impression is that I did; I can't say certain.

Mr. DUFFY: Please state if at any time D. N. Stanton executed a power of attorney to you for the sale of certain lands in Chattanooga, Tenn. If so, what has become of the original?

Ans. He issued a power of attorney to me. I don't know where the original is now.

Mr. DUFFY: When did you last see said power of attorney?

Ans. I don't remember.

Mr. DUFFY: Do you know whether you still have it among your papers?

Ans. I don't know.

Mr. DUFFY: Please examine certified copy of power of attorney herewith handed to you and say if, in your opinion, the same is a correct copy, and if so, please attach the same to your deposition.

A. I should think this was a correct copy, and the same is marked Exhibit "B" as a part of my deposition.

Mr. DUFFY: Please examine certified copy of deed filed with your deposition, marked Exhibit "A," and also the certified copy

226 of power of attorney also filed with your deposition, marked Exhibit "B," and then explain how it is the power of attorney bears date after the execution of the deed referred to as Exhibit "A?"

Ans. Mr. Wheeler, this Mr. Wheeler here, who was doing the business for Mr. Webster and other parties, requested me to do so, to get the power of attorney marked Exhibit "B."

Mr. DUFFY: This was after you had executed the deed hereinbefore referred to?

Ans. Yes, sir.

Mr. DUFFY: Did you hold any other position than that of general superintendent of the A. & C. Railroad Company?

Ans. I was a director of the company most of the time, perhaps all of the time; I don't remember.

Mr. DUFFY: Were you a director in 1870 & 1871?

Ans. I was a director in 1870 and part of 1871, and perhaps all of the time.

Mr. DUFFY: Who were the directors from January, 1870, to July, 1870?

Ans. My best recollection in regard to the directors is D. W. Stanton, Lewis Rice, Demmitt, Payne, Burr, Robinson, and others,

227 Mr. DUFFY. Please state whether or not the A. & C. Railroad Company executed a mortgage about March, 1870, to the State of Alabama for a loan of $2,000,000 of her straight bonds in pursuance of an act of the General Assembly of Alabama passed February 11th, 1870.

Ans. My recollection of that transaction is, the A & C. Co. borrowed of the State of Alabama their credit for $2,000,000, and State bonds were issued to the company therefor. The railroad company, as I understand it, made a deed of trust on lands which were donated by the State to this company, and $2,000,000 of land bonds, as they were called, were issued and paid over to the State of Alabama in return for its bonds..

The complain'ts except to the foregoing answer as not responsive to the question.

Mr. DUFFY: Did the Alabama & Chattanooga Railroad Company execute a mortgage to the State of Alabama for a loan of $2,000,000 of Alabama State bonds in pursuance of an act of the General Assembly of Alabama passed February 11th, 1870?

Ans. The company executed a mortgage or deed of trust to secure the $2,000,000 of bonds loaned by the State of Alabama.

228 Mr. DUFFY: State whether or not the A. & C. Railroad Company, in addition to the execution of the mortgage, issued $2,000,000 of A & C. Company bonds, and state whether or not the bond handed you in your opinion is one of said series of bonds; and is the signature of D. W. Stanton as president and that of A F. Thayer as secretary their signatures, and is the seal thereto attached the corporate seal of said company?

Ans. The company issued $2,000,000 of bonds and delivered them to the treasurer of Alabama. I should think this bond that you show me is one of the bonds It is the signature of D. W. Stanton, president; Thayer as secretary; the seal attached is the seal that was issued by the railroad company.

Mr. DUFFY: Please attach that bond, numbered 1990, to your deposition as a part of the same, as an exhibit.

Ans. I now attach said bond, numbered 1990, to my deposition as a part of it, being marked 'Exhibit 'C."

Mr. DUFFY: State if the A. & C. Railroad Company received said $2,000,000 of State bonds from the State of Alabama.

229 Ans. Yes.

Mr. DUFFY: Please state the financial condition of the Alabama & Chattanooga railroad from January 1st, 1871, up to July 1st, 1871. Please state fully.

Ans. The company got embarrassed, financially.

Mr. DUFFY: Please state whether or not you aided said railroad company by your individual endorsement to a large amount.

Ans. I did.

Mr. DUFFY: You will please state, if you know, through what bank the Alabama and Chattanooga Railroad Company did business in Chattanooga.

Ans. What business it transacted there with a bank was through the First National.

Mr. DUFFY: Did they not do a large business there?

Ans. They might have done so by way of exchange.

Mr. DUFFY: Please state who the officers of said bank were at the time and their respective positions.

Ans. Mr. Rothburn (W. P.) president and T. G. Montague
230 cashier. I think they were the only officers I was acquainted with.

Mr. DUFFY: State whether or not the paper, the drafts, and notes of the A. & C. Railroad Company were being protected in said First National Bank during the months of January, February, March, & April, of 1871.

Ans. I believe their papers went to protest in that bank.

Mr. DUFFY: State whether or not, as the general superintendent of the Alabama & Chattanooga Railroad Company in the early part of the year 1869, you as such general superintendent commenced grading the Alabama & Chattanooga railroad from near the old tannery in the direction of the Spring property hereinabove referred to.

Ans. I commenced grading this road & getting it ready for the track at that place.

The said witness was thereupon cross-examined by Mr. WHEELER, and deposed thereon as follows:

Mr. WHEELER: When you bought the 22 acres referred to in
231 your examination-in-chief from J. P. McMillin on the 25th March, 1869, did you receive from him any bond of title? If so, state why the same was not registered and where the original now is.

Ans. My recollection of that transaction is this: When I bargained or bought that land, as superintendent or agent, the president of the East Tennessee, Virginia, and Georgia Railroad, Thomas Calloway, was going to take for his company one-half interest in those lands. The company which I represented made the first payment, and my impression is now took a receipt for that money. I don't think that there was any bond for title ever given; if there was I have no recollection.

Mr. WHEELER: Do you remember how much the payment was that you paid?

Ans. Three thousand dollars.

Mr. WHEELER. What connection, if any, did you have in the passage of the Alabama Legislature of the act of February 11th, 1870, under which the two million straight bonds of Alabama were granted to aid in the construction of the Alabama & Chattanooga Railroad?

232 Ans. I got that bill passed as agent for the A. & C. road, as their agent.

Mr. WHEELER: Were you yourself present in Montgomery and did you negotiate the terms and conditions on which said bonds were to be issued.

Complainants object to the questions and all answers thereto, because the same is irrelevant and incompetent, and because it seeks to vary the conditions set forth in the mortgage, which alone must speak for itself.

Objection overruled and appeal granted.

Ans. I was present and dictated the bill that Judge Walker drew, which was afterwards introduced into the House & Senate and passed, & the Governor signed it & it became a law.

Mr. WHEELER: At this time was there anything of record showing that the Alabama & Chattanooga Railroad Company had any right, title, or interest in this land, or was there any such record at the date of the execution of the mortgage of March 2d, 1870?

Question objected to.

Ans. I know of none.

233 Mr. WHEELER: Did the State of Alabama, or any of its officers, or agents, or any member of the Legislature have any knowledged that the Alabama & Chattanooga Railroad Company had any interest in said lands at the date of the passage of the act of February 11th or at the date of the execution of the mortgage?

Ans. Not to my knowledge.

Mr. WHEELER: At the time you procured the passage of said act of Feb. 11th, did you have any design or purpose to include said lands in the mortgage to be executed in compliance with the provisions of said act?

Complainants object to foregoing question and all answer thereto for incompetency and irrelevancy, & because it seeks by parol evidence to vary a proper writing, which alone must speak for itself.

Ans. The bill that was presented to the Legislature will speak for itself. What I intended to cover by that bill was the lands which the State of Alabama donated to the A. & C. Company, and the telegraph poles, wires, instruments, and any other property that might have been placed upon that land which had been donated by the State.

234 Mr. WHEELER: The act recites as follows: "Provided further, That the Governor shall require said railroad company, before issuing to said company said bonds, to give the State of Alabama a first mortgage on the telegraph line and telegraph offices along the line of railroad belonging to said company, also on the machine shops and all other property in the State, and in Georgia, Tennessee, & Mississippi, also on all coal mines now open, or hereafter to be opened and worked, belonging to said company, and also on all iron or other mineral lands, and all iron manufacturing establishments now in operation and hereafter to be constructed." What did you intend or what was intended by "all other property in the State," &c.?

Complainants object to the foregoing question and to all answers thereto, because the same is incompetent and irrelevant, and a

proper question for the court to construe as to the proper meaning of the words recited in the acts of the Legislature of Alabama of Feb. 11th, 1878, and the mortgage thereunder.

Ans. The railroad company had opened a coal mine; they had personal property connected with that mine, such as tracks, cars, mules, tenement houses, and tools. It was intended to cover
235 that as well as the lands & telegraph poles and instruments.

Mr. WHEELER: Up to what time did the Alabama and Chattanooga Railroad Company pay the interest upon the two million bonds to secure the payment of which said mortgage was given?

Ans. They were paid but one or two interest coupons.

Mr. WHEELER: Has said company not been in default in the payment of the interest coupons of said mortgage since December 1st, 1878?

Ans. They have.

Mr. WHEELER: Did the board of directors of the Alabama & Chattanooga Railroad Company ever give you, in express terms, authority to purchase said lands from McMillin, except as it was given in your general power as superintendent or agent of said company?

Ans. I had full power from that company to buy any lands for depot *purchases* or for shops, settle rights of way, to deed or bond any lands which that railroad company owned in any way connected with that road for the benefit of the company.

The taking of the deposition of said witness and of pro-
236 ceedings under annexed commission is adjourned to Thursday, August 28, 1884, at the same hour and place, on account of the impossibility of finishing the same.

The taking of the deposition of said witness, JOHN C. STANTON, Sr., was continued this 28th day of August 1884, pursuant to above adjournment; and said witness, on further cross-examination, deposed as follows:

Mr. Wheeler appeared for defendants & Mr. Duffy for plaintiffs.

Mr. WHEELER: You have stated in an answer to one of my previous interrogations that the words "all other property" inserted in the act of February 11th, 1878, were inserted so as to embrace the personal property, &c., belonging to a coal mine owned by the company. State if this property was spoken of at the time the draft of the act was made and said words inserted by reason of the knowledge of the parties that such property existed? And state also as nearly as you are able the amount of money that had been expended by the company in the development of said coal mines and the purchase of the personal property belonging to the same.

237 Complainants object to the foregoing question and all answers thereto, because the same is incompetent, irrelevant, and because the acts of the State of Alabama are the best evidence of this transaction hereinabove referred to, and because the books of the company can prove the expenditure, and no evidence has been introduced to prove their loss.

Ans. I did talk with ex-Governor Smith, the then Governor of the State of Alabama, in regard to this coal mine and the property attached. I took him to the coal mine once or twice for the purpose of having him examine it. This was before the bill passed. I was before the committee of the Senate & House representing the bill as it was drawn. I told them about this coal mine, and represented to them the advantages it would be to the State; also that it had cost a large sum of money to open it & equip it. When the bill was drawn I intended to have it cover that property or any other improvements which might be put upon these lands, which were called government lands donated by the State to the company. I should say the mine and equipment cost about one hundred and
238 seventy to seventy-five thousand dollars.

End of the cross-examination.

Redirect examination of witness by Mr. DUFFY:

Mr. DUFFY: Did you or not state all matters in your cross-examination you have stated from your memory, or did you refer to books and papers to refresh your memory, or had you any other data upon which you relied?

Ans. The last answer to question in cross-examination was from memory entirely.

Mr. DUFFY: Were you well acquainted with Mr. J. P. McMillin, from whom you, as superintendent as aforesaid, purchased the lands for the A. & C. Railroad Company in Chattanooga, Tenn., known as the Spring property, and do you state the transaction as you have stated it in your cross-examination from memory, or have you any books and papers with which to refresh your memory?

Ans. I knew Mr. McMillin. I state the transaction from memory. To fix the date I sometimes refer to letters or telegrams to fix the date of that particular transaction; that is a general habit of mine.

Mr. DUFFY: In your former answer you state that in this
239 particular transaction about the McMillin property to fix the date *you state* you sometimes refer to telegrams; did you do so in this instance, and is the other statement as to the transaction as it then occurred made from memory?

Ans. I fixed the date from some memorandums or telegrams of my own which I had in my possession. Yes.

Mr. DUFFY: State whether or not the transaction about the McMillin property hereinabove referred to is made from your memory without reference to books and papers.

Ans. I have no deeds, receipts, bonds for title, or any papers in my possession that I know of connected with that trade of McMillin's.

Mr. DUFFY: The transaction is then from memory alone, is it not?

Ans. It is, except as I have already stated.

Mr. DUFFY: You say in your cross-examination a receipt was given by McMillin for the money paid by the A. & C. Railroad Company. Do you know of your own knowledge that no bond for title was executed, and how do you know it?

Ans. My impression is that a receipt was given for the money, as

I have here before stated. It may be barely possible that
240 there was a bond for title; if there was it ought to have been recorded. My instructions were to Mr. Duffy and Mr. Waite, and all officers who had anything to do with such transactions, to have the deeds, bonds for title, or any other papers of a similar character, recorded at once. That is one reason I think there never was a bond for title given, but a simple receipt for the money; and there was a question between Mr. Calloway and myself how the title should be given, whether it should be taken in the name of the Alabama & Chattanooga Railroad Company in the name of both companies, the East Tennessee, Virginia & Georgia Railroad Company, & the Alabama & Chattanooga Railroad Company.

Mr. DUFFY: Did you have more than one negotiation with the East Tennessee, Virginia & Georgia Railroad Company, through its president, Thomas Calloway, about purchase of lands in Chattanooga, Tenn., for railroad purposes? If so, please state them as near as you can remember.

Ans. I had more than one talk about lands for railroad purposes in Chattanooga. Mr. Calloway's company filed a bill to condemn
241 some land which was called the Boyce property. I told him that if he succeeded in condemning, my company would take a half interest in that land for railroad purposes. We finally agreed that we had better buy the Spring property. Both the A. & C. Railroad Company and Mr. Calloway's company put their civil engineers to make surveys and see if it was practicable to run their roads on the Spring property and have their union depots there. The engineers reported that it was a much better line than the one the East Tennessee were already using. There would be a saving of about three-quarters of a mile for through business and much easier curvatures. The East Tennessee had an interest in the Union passenger depot on 9th street, the grounds of which I understand were donated by the Crutchfield estate to the different roads to be used and occupied as a union depot. As I understand from Mr. Calloway there was a provision made by Crutchfield when he donated those lands to the roads that they should have their union depot on that ground, or so long as there was a hotel kept upon grounds opposite of
242 9th St. With this question raised, Mr. Calloway thought it was not prudent for his company to attempt to change, and so his company took no interest, and the deed was taken direct to the Alabama and Chattanooga Company.

Mr. DUFFY: In your cross-examination by Mr. Wheeler you refer to a coal mine and personal property thereto attached; please state in what State said coal mine is situated.

Ans. In the State of Alabama, 3½ miles north of Valley Head.

Mr. DUFFY. Please state if you have made search for the paper referred to in examination-in-chief of your authority from the board of directors.

Ans. I have looked for the paper referred to, — thus far have unable to find it.

Mr. DUFFY: State whether or not any other officer of the A. & C. Railroad Company, to wit, its president, treasurer, or any one of

its directors, have any such power as you state you had to transact business in the South, or was such general power given to you alone as such superintendent?

Ans. No, not that I am aware of. I transacted all the company's business in the South which came under my department.

243 Mr. DUFFY: In your cross-examination the question is asked you, did the board of directors of the Alabama & Chattanooga Railroad Company ever give you, in express terms, authority to purchase said lands from McMillin, except as it was given in your general power as superintendent or agent of said company?

In your answer you say you had full power from the company to buy any lands for depot purposes or for shops, settle rights of way, to deed or bond any lands which that railroad company owned or in any way connected with that road for the benefit of the company. Did you think any other authority than the general authority above referred to necessary, and did you not make said purchase under said general authority?

Ans. I made that purchase as agent of the company, as I did all other similar purchases. I do not think I had any special authority for buying that particular piece of land. The president of the road never was south or on the line of the road but twice while the road was being constructed, and never has been there since, to my knowledge. I understood my authority gave me the power to

244 transact any business which might come up connected with that company in the south. What I did has never been questioned by the board of directors, as far as I know, but I think they always sanctioned everything I did.

Mr. DUFFY: Was not this general power or authority from the board of directors to you as general superintendent granted to transact all business in the south, granted to you at the time you took charge of the construction of the road in or about the year 1868 or 1869?

Ans. At the time the company appointed me superintendent, or agent, I declined to go south and take charge of their business unless I could have absolute control of all business connected with that company. They agreed that I should have that. How full they made their minutes on their books in regard to that I am unable to say, but it was understood between myself and the board of directors that I was to have absolute control of all the business. They had no other man there but myself to transact any business that came under my department.

245 Mr. DUFFY: In your cross-examination you state the bill as prepared, and which afterwards became a law, to loan the credit of the State of Alabama to the Alabama & Chattanooga Railroad Company to expedite the construction of said railroad company in the State of Alabama, was dictated by you as the agent of said company; please state if the same was regularly passed and became a law, and did the Alabama & Chattanooga Railroad Company accept said loan as in said bill set forth.

Ans. Yes.

Mr. DUFFY: Did they execute the mortgage in pursuance thereof?

Ans. The bill and mortgage will speak for themselves. I should say they did.

The further taking of the deposition of said witness and proceedings under said annexed commission adjourned to August 29, 1884, at the same time and place, it being impossible to complete the same this day.

The taking of the deposition of said witness continued this 29th day of Aug., 1884, pursuant to above adjournment. Mr. Duffy appears for plff's and Mr. Wheeler for def'ts. Said witness,

246 upon further redirect examination, deposeth as follows:

Mr. DUFFY: Please state, at the time the deed was executed to Webster by you, what kind of payments or evidence of indebtedness was given in exchange therefor.

Ans. I was selling lands or lots in Chattanooga; in most instances was taking notes as part payment for them. This was my individual property. I offered to sell my lots or lands that I owned, or give any of that paper which I received for lands for claims against the A. & C. railroad. At one time Mr. Webster said to me he thought he would take notes for his claim against the said company; we had got to have money, and perhaps he could make a turn. He did take the notes, and afterwards came to me and said he was unable to use them, and returned them, and then bought the spring lands for his claim against the said company.

Mr. DUFFY: Who were the directors of the A. & C. Railroad Company from January, 1871, up to May, 1871, inclusive? Please name them, if you can.

Ans. I think Wm. F. Drake, Henry Clews, F. B. Loomis,

247 Andrew J. Lippitt, Lewis Rice, and others, of which some I don't remember the names. These men were once directors. I may be mistaken in regard to the exact time.

Mr. DUFFY: State whether or not D. W. Stanton was a director at this time.

Ans. He was.

Mr. DUFFY: At the time you dictated the bill, as the agent of the A. & C. Railroad Company, known as the two million bill, and which was passed and became a law, did you not know, as such agent, that the A. & C. Railroad Company was the owner of the Spring property?

Ans. Yes.

Mr. DUFFY: State whether or not the A. & C. Railroad Company, at the time of the passage of the two million bill, had any incumbrances upon their property. And did the State of Alabama know of such encumbrances?

Ans. There was a first mortgage, known as the $4,720,000.00 mortgage, and a second mortgage that was $9,000 a mile on 295 miles, about. Both mortgages were recorded in the State of Alabama, in the different counties in which the road ran.

248 Mr. DUFFY: State whether or not the A. & C. Railroad

Company was adjudged an involuntary bankrupt, and state, if you please, about the date of the adjudication.

Ans. One Jones first filed a bill to throw the road into bankruptcy in June, 1871. The road was not adjudged a bankrupt until September, 1871.

Mr. DUFFY: Please state where the general offices of the A. & C. Railroad Company were kept in 1871.

Ans. The president and directors, treasurer, and secretary had their offices in New York.

Mr. DUFFY: Please state, if you know, what became of all their books and papers, &c., of said railroad company kept in their general office in New York, and especially the book in which was kept the proceedings of the board of directors, called the minute-book.

Ans. I only know what I have heard. I know nothing of my own personal knowledge that they were attached for a company debt and sold. I don't remember of ever seeing them since.

Mr. DUFFY: Do you know who became the purchaser at said sale of said books and papers?

249 Ans. D. W. Stanton told me that he bought them.

Mr. DUFFY: Please state whether or not the passage of the two million bill was attended with much difficulty, and did it not take much time & work before it finally became a law.

Ans. Yes.

Mr. DUFFY: You say in your redirect examination that you had more than one talk with Mr. Calloway, the president of the East Tennessee, Virginia and Georgia Railroad Company, about purchasing lands; will you now please state if your talks or negotiations referred to the Spring property alone, and before you, as agent, finally acquired it for the A. & C. Railroad Company by purchase, as you have before stated?

Ans. I had a talk before the purchase and after with Mr. Calloway; not that property alone, but other lands as well as that.

The parties to this action waive the general interrogatory required by rule 71.

J. C. STANTON.

The taking of depositions under the annexed commission
250 adjourned to Aug. 30, 1884, at same time & place.

Pursuant to above adjournment the taking of deposition- under said commission continued, this 30th day of August, 1884.

Mr. Duffy appeared for plaintiffs, and Mr. Wheeler for def'ts.

WILLIAM F DRAKE produced as a witness for plaintiffs, and, being first sworn by said commissioner to answer truly all such questions as might be propounded to him touching the matter in controversy here, deposed as follows:

Mr. DUFFY: State if at any time during the years 1870 and 1871 you had any connection with a road formerly known as the Alabama & Chattanooga railroad, running from Chattanooga, in the State of Tennessee, through the State of Alabama to Meridian, in

the State of Miss.; if you answer you were connected with said road, state how long you were connected with such road, what position or positions you held during that time, giving dates of each position as near as you can.

Ans. I became connected with the Alabama and Chattanooga railroad in October, 1871. I was elected president at a meeting held in the fore part of October; held that position about 2 years.

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Mr. DUFFY: State where you held such position as president, and where were the general offices.

Ans. The general office was here in New York; there was a branch office in Chattanooga, Tenn.

Mr. DUFFY: Were you at any time prior to October, 1871, a director of said Alabama & Chattanooga railroad?

Ans. No.

Mr. DUFFY: Were you a director during the period, to wit, from Jan. 1st, 1871, to June 1st, 1871?

Ans. No; not at at that time.

Mr. DUFFY: You state you were president of said railroad company; please state who was your predecessor.

Ans. D. W. Stanton.

Mr. DUFFY: Please state whether or not the books and papers of the general office here in New York were turned over to you as president.

Ans. No.

Mr. DUFFY: Do you know anything of their whereabouts?

Ans. No.

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Mr. DUFFY: Please state if you are acquainted with J. C. Stanton & D. W. Stanton.

Ans. I am acquainted with both.

Mr. DUFFY: What relationship do they bear to one another?

Ans. I always understood they were brothers.

Mr. DUFFY: Please state who was your successor.

Ans. I don't think I ever had a successor.

Mr. DUFFY: Do you know whether or not said A. & C. Railroad Company was adjudicated a bankrupt? If so, please state all you know about it.

Ans. It was adjudicated a bankrupt, &, as I understood, in New York, Georgia, Tennessee, and Alabama, under as many suits.

Mr. DUFFY: Please give as near as you can the date that said A. & C. Railroad Company was adjudicated a bankrupt, and where.

Ans. As near as I can give, in 1871, in New York, Tennessee, Georgia, & Alabama. I also understood it was put into bankruptcy earlier in the season, and then taken out and then put in again.

Mr. DUFFY: Please state, if you know, how many mortgages

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the A. & C. Railroad Company executed, time, dates, and their respective amounts.

Ans. There were three mortgages; the amounts I can't give. Don't remember the amounts. A first mortgage, a second mortgage, and a land mortgage, I think, they called it.

Mr. DUFFY: Please state the financial condition of the A. & C. railroad after January 1st, 1871?

Ans. I know nothing about the financial condition of the company only as it was represented to me up to the fall.

The said attorneys for the parties hereto waive the general question required by rule 71.

WILLIAM F. DRAKE.

JOHN SWANN, a witness produced on the part of the plaintiffs, being first duly sworn by the said commissioner, deposed as follows:

Mr. DUFFY: Please state your age, occupation and residence.

Ans. I am forty-eight years old; I am a lawyer; I am a resident temporarily of the city of New York; I have offices here in America, but I do not reside here permanently; I live in England.

254 Mr. DUFFY: Please tell what interests you represent in this suit; if you say you are the trustee for certain bondholders tell what bondholders, as far as you can, and give a history of your connection with the matter.

Ans. I represent certain bondholders commonly known as holders of the straight gold bonds of Alabama. The history of the transaction is, briefly, the State of Alabama some years ago scaled its endorsement on certain railway bonds held in Europe. It was apprehended that it would also scale its straight bonds. Rather than suffer this loss the bondholders, after a good deal of negotiation, were willing to accept from the State certain assets of the State as an equivalent for the surrender of State bonds. The result of their negotiations are embodied in an act of the Legislature. The terms and conditions of that act can be seen by reference to it. That act contemplated, amongst other features, the surrender of bonds in manner therein described, and the conveyance to trustees for the bondholders of various assets therein described. The Governor of the State,

255 having satisfied himself that all proper conditions had been complied with, instructed his legal advisers to draw a conveyance in pursuance of the terms of the act. He then executed that conveyance, & having affixed the seal of the State thereto, delivered it to me as trustee of the bondholders, the other trustee being the nominee of the Governor. A copy of that deed was delivered to the State trustee, and a copy of it was sent to London, and so far as I know has always been regarded & treated as the leading document which constituted my title & defined my duties.

Mr. DUFFY: Is the act hereinabove referred to by you an act of the Legislature passed Feb. 23d, 1876, commonly known as the debt settlement act?

Ans. It is the act commonly known as the debt settlement act. I cannot speak positively as to the date.

Mr. DUFFY: Please examine a certified copy of an act of the Legislature of Alabama and say if it is the same act under which you are now acting as trustee, and please append said act to your

256 deposition as an exhibit, and make it a part of your answer.

Ans. Yes; I take that to be a certified copy of the act under which I am acting. I append it to my deposition.

Said certified copy appended and marked for identification Exhibit "D."

Mr. DUFFY: Please state how and where you were appointed trustee for said bondholders above named, in pursuance of said act of the Legislature, which you have made an exhibit of your deposition?

Ans. The meeting of the bondholders was held in the city of London. Matters relating to their protection and interest were discussed and adjusted in the ordinary way. A resolution was duly passed as to my appointment, and instructions were given me as to my duties and responsibilities.

Mr. DUFFY: Please state if your said appointment as trustee was made by a majority in number and value of said bondholders hereinabove referred to, who had signified in writing by the 1st day of May, 1876, to the Governor of Alabama their intent to sur-
257 render their said bonds in pursuance of said act of the Legislature of Alabama above referred to.

Ans. Yes; I remember that attention was distinctly called to that in London, & I understand the Governor to have distinctly passed upon it before executing the conveyance to me.

Mr. DUFFY: Tell, if you know, how many of the said bondholds in value had, by the 1st day of May, 1876, signified their intent in writing to the Governor of Alabama to surrender their said bonds under the terms mentioned in the act of the General Assembly of Alabama passed Feb. 23, 1876, and a certified copy of which is made a part of your deposition.

Ans. I don't know.

Mr. DUFFY: State, if you know, whether or not the Governor of the State of Alabama ever made the appointment of the trustee mentioned and contemplated in section 19 of the said debt-settlement act, a certified copy of which act is appended to your deposition.

Ans. I understand and believe that he did, and the appointment has always been recognized under the conveyance, but in
258 what form or on what evidence the Governor appointed his own nominee is quite outside of the scope of my business. I should regard it as the Governor's official business to see to the appointment of his own nominee.

Mr. DUFFY: Please state who was appointed such trustee.

Ans. Hon. John A. Billups.

Mr. DUFFY: Please state if the said trustee so appointed is a co-complainant in this cause, and is still acting as such trustee.

Ans. He is.

Mr. DUFFY: Does your duties under your said trust make you a liquidator as well as a trustee?

Ans. I understand them to do so.

Mr. DUFFY: If your duties under your appointment make you a liquidator as well as trustee during the pending of said trust, you will please state whether or not all the assets of any kind, nature, and description conveyed to you and your cotrustee by the deed of

conveyance of the Governor of Alabama will pay the debt of said bondholders hereinabove referred to.

259 Ans. To the best of my belief, they won't pay anything like half of it. I could not as a liquidator discharge more than a mere fraction of the indebtedness out of the sale of lands or realizations of other assets.

Mr. DUFFY: Please state if you had in your possession or under your control the deed executed by the Governor of Alabama under and in pursuance of the act of the Legislature of Alabama, commonly known as the debt-settlement act, passed Feb. 23rd, 1876, a certified copy of which is attached to your deposition.

Ans. Yes; I have it in my possession.

Mr. DUFFY: Will you please produce it?

Ans. I produce said deed, and will file a certified copy of it with my deposition.

Mr. DUFFY: State whether or not the original mortgage was turned over to you under said deed of conveyance of the Governor as aforesaid.

Ans. No; the State has always informed the trustees that the mortgage could not be found, although numerous applications have been made for it.

Mr. DUFFY: Please state if you are familiar with the language of said mortgage.

Ans. I think I am reasonably so.

260 Mr. DUFFY: Please examine a certified copy from the records of Hamilton Co., Tennessee, purporting to be a copy of said mortgage, and state if in substance it is a copy.

Ans. I believe the copy shown to me to be a copy of the mortgage as recorded; my acquaintance with the mortgage is as it is recorded.

Mr. DUFFY: Please state whether or not you and the said Billups, the said trustee, accepted the trust and entered on the discharge of the duties thereof, and whether or not you are both now acting.

Ans. Yes; we accepted the trust and entered on the discharge of our duties, and are discharging them to-day.

Mr. DUFFY: Please state whether or not the State of Alabama, in conformity with the deed executed by its Governor, delivered to the trustees the two million A. & C. railroad land bonds contemplated to be delivered by said deed, and whether they are now in the possession of said trustees.

Ans. I suppose that by land bonds you mean the A. & C. railway bonds issued by the company to the State. The State delivered to me a box of these bonds, and they are in my possession either

261 actually or constructively; either they are in my office or some one of my agents has them on my behalf.

Mr. DUFFY: What I mean is the bond executed by the A. & C. Railroad Company in exchange for two millions of straight gold bonds of the State of Alabama loaned to said road under and in pursuance of an act of the General Assembly of the State of Alabama passed Feb. 11th, 1870.

Ans. These are the bonds referred to in my previous answer.

Mr. DUFFY: Please state the number of the bondholders who are beneficiaries under said deed of trust.

Ans. I cannot state the number of bondholders, but can only describe them as a class. I understand all bondholders who surrender to the beneficiaries under the trust. I do not know the number of surrendering parties, but in point of value I should say about three-quarters had surrendered. As many bondholders surrender without giving me notice—possibly a larger proportion than the above has surrendered.

Mr. DUFFY: Please state what interest the State of Alabama
262 had in this suit at the time this suit was brought, to wit, on the 28th day of May, 1883.

Ans. So far as I know, the State's interest is defined in the act and in the conveyance to me, and you know as much about it as I do. The description that I should give of the interest would be, shortly, that the State was entitled to ten per cent. of the net proceeds of sales until a certain limit was reached, or, in short, until the State was recom'p'ed for certain outlays which she claimed to have made.

End of direct examination of said witness.

Said witness, cross-examined by Mr. WHEELER, further deposed as follows:

Mr. WHEELER: At the meeting in London of the holders of the straight bonds of Albama, by whom you were appointed trustee, state how many holders of bonds, and of what value, were represented, as nearly as you are able.

Ans. So far as I remember, the bondholders' meeting at which resolutions were passed appointing an executive committee and authorizing the acceptance of the terms offered by the State, I think about, perhaps, from two-thirds to three-fourths were repre-
263 sented. I estimate this rather by inference, from dates subsequently coming under my notice, than from direct knowledge of facts. I was not present at the meeting.

Mr. WHEELER: Up to what time had the interest on the straight gold bonds of the State of Alabama referred to been paid?

Ans. That is a question which I cannot possibly answer. The contest between myself and the State on the subject lasted for several months. I do not think that any trustworthy conclusion was arrived at. The State positively affirms, and I think could probably show, the payment of two coupons; but this very subject has been discussed at great length and no opinion that I could give on it amounts to any statement of fact.

Mr. WHEELER: Up to what time were the interest coupons of the two million bonds of the Alabama & Chattanooga railroad, issued in pursuance of the act of Feb. 11th, 1870, paid?

Ans. I don't know; I don't think any trustworthy information can be obtained on this point unless the State officers have some evidence in their possession which has never been produced to me.

264 Mr. WHEELER: The bond No. 1990 made exhibit to the deposition of J. C. Stanton in this couse bears date March 2d

1870, and the coupons fall due on the 1st of June and 1st of December of each year thereafter. The Alabama & Chattanooga Railway Company was adjudged an involuntary bankrupt in the summer of 1871. The coupons on this bond No. 1990 have all been detached up to the one falling due June 1st, 1876. Can you explain the reason why the coupons falling due between 1871 and 1876 were detached and by whom it was done?

Ans. No; I didn't know. The bonds delivered to me by the State have not ever been taken out of the box by me nor examined in detail. The box of bonds as delivered to me, can be examined at any time consistent with reasonable convenience, and any information to be derived from them is accessible at any time.

Mr. WHEELER: You then do not know whether the coupons have been clipped from the other bonds as they have in this?

Ans. I don't know.

Mr. WHEELER: State what property has passed into your hands & that of Mr. Billups, as trustees; under and by virtue of the
265 act of the deed of the Governor executed in pursuance thereof.

Ans. So far as I can classify property from memory, I should say whatever lands the State had to pass, & secondly whatever chose in action it had to pass, such as unpaid purchase-money or right of action, & thirdly whatever benefit she could transfer to us from the mortgage and whatever benefit she could transfer by means of a lot of old papers, including a lot of vouchers, amongst others the bonds issued by the railway company, and whatever remedies or rights or value there may be in the general residuum of papers, &c., which I cannot specify from memory.

Mr. WHEELER: State what lands, the quantity, where located, and what disposition you have made of the same, if any.

Ans. The quantity of land has been continually changing, but may be roundly stated at 500,000 acres. It is situate adjacent to the railroad, in the State of Alabama, for perhaps, roughly, 170 miles, the alternate wild sections within six and fifteen miles constituting one land grant. Of this land some has been sold in fee-simple and of other portions the surface right only has been sold.
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Beyond that there have been no dealings with it that I know of; by that I mean it has not been mortgaged or pledged or anything done with it.

Mr. WHEELER: How much of said land remains undisposed of, and how much land have you sold the surface right to.

Ans. I should think, allowing for recent acquisition of some 70,000 acres, there must be undisposed of between 450,000 and 500,000 acres. I should think the surface has been sold of 90,000 acres or thereabouts, the fact being that the land that we have acquired from time to time from the Department of the Interior has operated as a set off against lands sold.

Mr. WHEELER: How much land has been sold since you became trustee?

A. I should say, roughly, in the neighborhood of 130,000 acres altogether.

Mr. WHEELER: Have you procured from the Department of the Interior all the lands to which you are entitled?

Ans. I could not say that because if we could get all that
267 we are entitled to our mileage would entitle us to eight or nine hundred thousand acres. The best I can say is that we have obtained everything that was obtainable and selected everything that was open to selection and applied for a great deal more than we got.

Mr. WHEELER: Do you expect to obtain any more land from this source?

Ans. Not with anything like confidence or in any substantial quantity.

Mr. WHEELER: What choses in action have you received from the State of Alabama, and what have you realized from the same?

Ans. This is a question asking me to give from my head a list of matters which will be found in my books. I cannot furnish you from memory with a list of cases without access to the books in which accounts of the sup. are kept. I will designate one class alone of chose in action as an illustration. All cases of unpaid purchase-money come under this head. I cannot give you a list of them without my books.

Mr. WHEELER. When do you and Mr. Billups expect to close the trust?

Ans. Speaking from memory, in May, 1886.

268 Mr. WHEELER: Can you tell me how much you have paid the State of Albama from the proceeds of the trust?

Ans. As near as I remember, $40,000.00.

Mr. WHEELER: How much more does the State of Alabama claim, and how much do you admit as due her?

Ans. I am not aware that the State claims anything as due her, and I do not admit anything, if she does.

End of cross-examination.

The said witness was further examined by Mr. DUFFY in redirect examination, & deposed as follows:

Mr. DUFFY: Please state when you received said bonds, hereinabove referred to, from the State of Alabama; please give the date as near as you can.

Ans. As near as I can remember, it would be about March, 1882.

Mr. DUFFY: The lands you have acquired from the Department of the Interior since your trust began, and which you refer to in your cross-examination, has been acquired at the expense of the trust, has it not?

Question last above withdrawn.

269 JOHN SWANN.

The general interrogatory required by rule 71 is waived in the case of the above-named witness, John Swann, by the attorneys for the respective parties hereto.

The further taking of depositions under said commissioner ad-

journed to Monday, Sept. 1st, 1884, at same hour and *and* place, because of the inability to complete the same.

Pursuant to above adjournment the taking of deposition- under said commissioner continued this 1st day of Sept., 1884, before said commissioner at same hour and place.

Mr. Duffy appears for plaintiffs and Mr. Wheeler for defendant-.

JEREMIAH RICHARDS, a witness produced on the part of the plaintiffs, being first duly sworn by said commissioner, deposed and said as follows:

Mr. DUFFY: Please state your age & residence.

Ans. I am 39 years of age, and live at Roselle, New Jersey.

Mr. DUFFY: Please state whether or not you were connected with a road known as the Alabama & Chattanooga Railroad
270 Company; if you answer yes, please state your connection therewith, the time and date.

Ans. So far as I can recollect I became connected with the A. & C. Railroad in Nov., 1870. I was elected secretary in the spring of 1871 and treasurer in 1872.

Mr. DUFFY: Where was your place of business during that time?

Ans. The office of the company was 90 Broadway, N. Y. city, & afterwards at 96 or 98 Broadway. I was present as secretary of the company.

Mr. DUFFY: If you can, please give as near as may be the date you were elected secretary and also the name of the directors of said railroad company at that time and their residences.

Ans. I think I was elected secretary in June, 1871, and the directors were D. W. Stanton, of New York; J. C. Stanton, Chattanooga, Tenn.; F. B. Loomis and A. C. Lippitt, of New London, Conn.; Lewis Rice, John DeMerritt, of Boston, and Samuel Wheeler, of New York.

Mr. DUFFY: Please state how said directors were called together.

Ans. My impression is that the meetings were adjourned
271 from time to time, or that they came together by call of the president.

Mr. DUFFY: Please state how many constituted a quorum.

Ans. I think a majority of the board.

Mr. DUFFY: Please state whether or not F. B. Loomis, A. C. Lippitt, Lewis Rice, and John DeMerritt, & J. C. Stanton attended said meetings generally.

Ans. I think they did, so far as they could.

Mr. DUFFY: Please state how many meetings were held after you were elected secretary up till Aug. 1st, 1871.

Ans. I cannot say; I have no recollection of any.

Mr. DUFFY: Please state whether or not you were the custodian of the book or books and papers of the Alabama and Chattanooga railroad, and especially the book of the proceedings of the directors' meeting—the minute-book.

Ans. I had general charge of the books and papers.

Mr. DUFFY: Do you know where said books are now?

Ans. I do not.

Mr. DUFFY: To whom did you deliver them when you resigned, if you have resigned?

272 Ans. They were taken possession of by D. W. Stanton, who bought the books at sheriff's sale.

Mr. DUFFY: When did you last see said books, to the best of your recollection, or have anything to do with them?

Ans. I cannot answer positively, but am confident that I have not seen any of them during the past five years.

Mr. DUFFY: Please examine the paper handed you and state if it is in substance a copy from said minute book of the general power and authority given by the board of directors to J. C. Stanton as general superintendent of the Alabama and Chattanooga Railroad Company?

Ans. I believe it to be so.

Mr. DUFFY: Please attach a copy of said copy to your deposition and make it a part thereof.

Ans. I do attach a copy of said copy as Ex. "E."

Mr. DUFFY: Please state if you know how many mortgages the Alabama & Chattanooga railroad executed?

Ans. I remember three first mortgages—secured mortgage and land grant mortgage.

273 Mr. DUFFY: Please state whether or not the mortgage referred to by you in your previous answer as the "land grant mortgage," is the same mortgage under which the Alabama and Chattanooga Railroad Company received the two millions of straight gold bonds from the State of Alabama.

Ans. It is not.

Mr. DUFFY: Then please describe the mortgage you refer to.

Ans. The mortgage I refer to was issued in the fall of 1871, I think, and covered the lands deeded by the State.

Mr. DUFFY: Please state whether or not you know if the A. & C. Railroad Company received two millions of straight Alabama bonds from the State of Alabama, and your means of knowing.

Ans. Yes; I know it from the books & records of the company.

Mr. DUFFY: Please state whether or not you, as well as D. W. Stanton, Wm. F. Drake, and Albert F. Thayer, and perhaps some others, testified in a case by interrogations in which B. F. Gardner was complainant and J. C. Stanton and others were defendants in the chancery court of Chattanooga county, Tenn., in or about the year 1874.

274 Ans. I believe so, but have no definite recollection.

Mr. DUFFY: Please give the date, as near as may be, when you last made any estimate or had possession of the minute-book of the directors.

Ans. I haven't the slighest recollection.

Mr. DUFFY: Please state whether or not it was as late as the year 1876 or 1877.

Ans. I may have done so, but don't remember it.

End of examination.

J. RICHARDS.

FREDERICK WOLFFE, a witness produced on the part of the plaintiffs, and being first duly sworn by said commissioner, deposed as follows:

Mr. DUFFY: Please state whether or not you were in any way connected with a road formerly known as the Alabama and Chattanooga railroad. If you answer yes, please state what your connection was, & whether you are at present in any way connected with it.

Ans. Yes. I was appointed assignee in bankruptcy about 1874, and I assisted in 1877 as the agent of John Swann in the
275 purchasing of the Alabama & Chattanooga railroad from John C. Stanton and Wilder and McMillin, and after reorganization of said Alabama & Chattanooga Railroad Company into the Alabama & Great Southern I became the financial manager of the same.

Mr. DUFFY: Please state whether or not you are still the assignee in bankruptcy of the Alabama & Chattanooga Railroad Company. If you answer yes, please state if you are the sole assignee.

Ans. I have not been actively engaged as assignee of the Alabama & Chattanooga Railroad Company since 1879, but there has been no other assignee appointed, nor have I been discharged as assignee, & since the death of my coassignee, James F. Dresser, about 1880, I have been the sole assignee, & no other appointments have been made to supercede him or myself.

Mr. DUFFY: Please state whether or not the State of Alabama became the purchaser of the A. & C. railroad at a bankrupt sale under which said road was adjudicated a bankrupt in the middle district of Alabama at Montgomery, Alabama; and, if so, did she pay for the same?

276 Ans. The State of Alabama became the purchaser of the Alabama & Chattanooga railroad at a bankrupt sale and paid $312,000.00 for the same.

Mr. DUFFY: Please state whether or not the said State of Alabama purchased at said sale hereinabove referred to the equity of redemption.

Ans. I think it did.

Mr. DUFFY: Please state whether or not you are acquainted with John Swann.

Ans. I am. I have known Mr. John Swann since the early part of 1877 as the agent and trustee for the committee of bondholders of the Alabama & Chattanooga Railroad Company in London, and as trustee for the land or gold bondholders, & I have assisted him in the compromise made between the State of Alabama and the first-mortgage bondholders of the Alabama & Chattanooga railroad, and also in the settlement of exchanges made by him as trustee for the gold bondholders secured by lands of the Alabama & Chattanooga railroad.

Mr. DUFFY: Please state whether or not a deed was executed by the Governor of Alabama to John Swann as such trustee con-
277 veying to him certain lands, rights, & properties, &c.

Ans. Yes; the deed was executed by the State of Alabama

to John Swann, trustee for the bondholders, & J. A. Bilups, as trustee for the State of Alabama, conveying to them all the right, title, & interest which the State of Alabama had, or may receive, into all the lands and other property conveyed by mortgage to the State of Alabama by the Alabama & Chattanooga Railroad Company.

Mr. DUFFY: Please state whether or not you know George S. Houston; and, if so, please state if you are familiar with his handwriting & signature.

Ans. I knew George S. Houston, late Governor of Alabama, during the time that he was Governor of Alabama; had many transactions with him as such Governor in my capacity of assignee in bankruptcy, as well agent of said Swann, & in other matters, & I am familiar with his signature & handwriting.

Mr. DUFFY: Please examine the paper writing handed you purporting to be a deed signed by George S. Houston, as the Governor of Alabama, conveying certain property & rights to John Swann & John A. Billups, as trustees, a copy of which is made an exhibit to the deposition of John Swann in this cause, and say whether the signature to said deed is in the handwriting of George S. Houston and is his genuine signature, as the same purports to be.

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Ans. Yes; the signature attached to the deed handed to me is the signature of George S. Houston, late Governor of the State of Alabama, & is in his handwriting.

To such of the foregoing interrogatories as call for answers which can be shown by written evidence or records of courts the defendants, by their solicitor, objects and excepts to the answers to same. Objection overruled and appeal granted.

The general interrogatory required by rule 71 is waived by the parties hereto.

FRED. WOLFFE.

CITY AND COUNTY OF NEW YORK, *ss:*

I, Charles Gibson Bennett, one of the commissioners named in the annexed commission, do certify as follows: At the city of New York, at the office of Bennett & Coxe, at 55 Liberty St., in said city, the taking of depositions of witnesses, under and pursuant to said commission, on the 27th day of August, 1884, was begun before me, and counsel or agents appeared on behalf of the respective parties, plaintiff and defendant, and the taking of said depositions was continued before me at said place from day to day, and was closed on first day of September, 1884; and I furthermore certify that the depositions of the said witnesses mentioned in the caption and taken as aforesaid were reduced to writing by me, and after having been read by me to the said witnesses respectively were respectively signed by the same in my presence; and I further certify that the said witnesses were all sworn by me before testifying, as appears in the body of the foregoing depositions; and I further certify that I am not interested in the cause, nor of kin or counsel to either of the parties; and I further certify that the paper writings

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here within enclosed, and each marked and signed by me as an exhibit in the cause, are simply enclosed with the depositions, and not physically attached to the same, by the consent and direction of the counsel for the respective parties appearing before me as aforesaid, for greater convenience of use; and I further certify that I sealed up the said depositions & exhibits, and put them in the post-office at New York city, without their having been out of my possession or having been altered after they were taken.

Given under my hand the third day of September, 1884.

CHARLES GIBSON BENNETT,
Commissioner.

I certify that my fees and disbursements as commissioner as aforesaid are—fees, $100.00; disbursements, $1.32; total, $101.32; and that the same have been paid by or on behalf of the plaintiffs in said cause

CHARLES GIBSON BENNETT.
Commissioner.

UNITED STATES OF AMERICA, *Eastern District of Tennessee:*

The President of the United States of America to MacGrane Coxe and Chas. W. Bennett, Greeting:

Know ye that we, in confidence of your prudence and fidelity, have appointed you commissioners, and by these presents do give you, or either of you, full power and authority diligently to examine upon their corporal oaths or affirmations before you to be taken, John C. Stanton, Sr., Daniel N. Stanton, Wm. F. Drake, Jeremiah Richards, Albert F. Thayer, S. L. Wheeler, Frederick Wolffe, and John Swann, as witnesses on the part of the plaintiffs in a certain cause now pending undetermined in the circuit court of the United States for the eastern district of Tennessee, in the sixth circuit, wherein the State of Alabama and others are plaintiffs and Theodore G. Montague and others are defendants, touching the premises.

And we do hereby require you, before whom such testimony is taken, to reduce the same to writing and to close it up under your hand and seal, directed to the clerk of our said court at Chattanooga, and that you return the same, when executed as above directed, annexed to this writ, with the title of the cause endorsed upon the envelope thereof, into the said circuit court, before the judges thereof, with all convenient speed.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Chattanooga in the said district this 16th day of August, in the year of our Lord one thousand eight hundred and eighty-four.

[Seal of the Court.]

A. R. HUMES,
Clerk U. S. Circuit Court, Eastern District of Tennessee,
By W. G. McADOO, JR.,
Deputy Clerk.

Endorsed: No. —. Commission. State of Ala. *et als. vs.* Theo. G. Montague and others. Issued August 16th, 1884. A. R. Humes, clerk.

In the United States Circuit Court for the Southern Division of the Eastern District of Tennessee. In Equity.

THE STATE OF ALABAMA *et als. vs.* THEO. G. MONTAGUE *et als.*

The defendants in said cause will take notice that the complain'ts will, in conformity with an agreement made by counsel for the defendants and complainants, at 10 o'clock a. m. on the 27th day of August, 1884, at the office of Bennett and Coxe, at No. 55 Liberty St., corner of Nassau and Liberty street-, in the city of New York, State of New York, before MacGrane Coxe or Charles Gibson
283 Bennett, or either of them, commissioners duly appointed by our said circuit court, under a commission issuing therefrom, proceed to take the depositions of John C. Stanton, Sr., Daniel W. Stanton, William F. Drake, Jeremiah Richards, Albert F. Thayer, S. L. Wheeler, Fred'k Wolffe, and John Swann, and continue from day to day until completed, to be used as evidence for the complainants on the trial of said cause.

This 15th day of August, 1884.

S. F. RICE, &
PHELAN & GOREE,
Sols. for Compl'ts.

Endorsed: John Swann *et als. vs.* T. G. Montague *et als.* Depositions of J. C. Stanton, Wm. F. Drake, Jeremiah Richards, Fred. Wolfe, Jno. Swann.

We acknowledge due and legal service of the within notice at Chattanooga, Tenn., this Aug. 15, 1884. Wheeler & Marshall, sol's for def'ts.

BOSTON, *January 26th*, 1869.

At a meeting of the board of directors of the Alabama & Chattanooga Railroad Company, held this day, it was voted
284 "that the general superintendent have charge of building and equipping the railroad, with power to buy all materials and make all contracts incident thereto, and that all employees of the company shall be under his charge and subject to his orders, with power to dismiss whenever he may deem it for the best interests of the road so to do.

"[Seal Alabama & Chattanooga Railroad Company of Alabama, Georgia, Mississippi, & Tennessee.]

"(Signed) ALBERT F. THAYER, *Sec'y.*"

A true copy.
Attest: J. RICHARDS.
ANDREW W. KENT, *Notary.*

STATE OF TENNESSEE, *Hamilton County:*

I, T. M. McConnell, clerk & master of the chancery [court] of said county, hereby certify that the foregoing is a full, true, and perfect

copy of a paper attached as an exhibit to the deposition of D. W. Stanton, filed in the cause of B. F. Gardner *vs.* J. C. Stanton *et als.*, No. 1355 in said court, as the same remains on file in my office.

285 Witness my hand and the seal of said court, at office in the city of Chattanooga, Tennessee, this 14th August, 1884.

[Seal Chancery Court of Hamilton County, Chattanooga, T.]

T. M. McCONNELL,
Clerk & Master.

STATE OF TENNESSEE:

I, W. M. Bradford, chancellor of the third chancery division of said State, and in which Hamilton county is included, hereby certify that T. M. McConnel, whose genuine signature appears to the foregoing certificate, is, and was at the time of signing the same, the clerk & master of said court; that all his official acts are entitled to full faith and credit, and that said certificate is in due form.

Given under my hand and private seal, having no seal of office, this 14th August, 1884.

W. M. BRADFORD, [SEAL.]
Chancellor 3d Chancery Division of Tennessee.

Endorsed: Marked for identification Exhibit "E," being copy of a copy referred to by witness Richards. Charles Gibson Bennett, commissioner.

286 In the United States Circuit Court for the Southern Division of the Eastern District of Tennessee. In Equity.

THE STATE OF ALABAMA *et als. vs.* THEO. G. MONTAGUE *et als.*

The defendants in said cause will take notice that the complainants will, in conformity with an agreement made by counsel for the defendants and complainants, at 10 o'clock a. m., on the 3rd day of September, 1884, at the American House, on Hanover St., in the city of Boston, county of Suffolk, Commonwealth of Massachusetts, before James B. Bell or Walter Clapp, or either of them, commissioners duly appointed by our said circuit court under a commission issuing therefrom, proceed to take the depositions of Isaac T. Burr, Samuel A. Carlton, Henry E. Waite, William H. Richards, John Demerritt, and Robert Treat Paine, Jr., and continue from day to day until completed, to be used as evidence for the complainants on the trial of said cause.

This 15th day of August, 1884.

S. F. RICE,
PHELAN & GOREE,
Sol's for Compl'ts.

287 Endorsed: We acknowledge due and legal service of the within notice at Chattanooga, Tenn, this 15th day of August, 1884. Wheeler & Marshall, sol's for def'ts.

UNITED STATES OF AMERICA, *Eastern District of Tennessee:*

The President of the United States of America to James B. Bell and Walker Clapp, Greeting:

Know ye that we, in confidence of your prudence and fidelity, have appointed you commissioners — by these presents do give you or either of you full power and authority diligently to examine upon their corporal oaths or affirmations, before you to be taken, Isaac T. Burr, Samuel A. Carlton, Henry E. Waite, Wm. H. Richards, John Demerritt, and Robert Treat Paine, Junior, as witnesses on the part of the plaintiff, in a certain cause now pending undetermined in the circuit court of the United States for the eastern district of Tennessee, in the sixth circuit, wherein the State of Alabama and others are plaintiffs and Theodore G. Montague
288 and others are defendants, touching the premises.

And we do hereby require you, before whom such testimony is taken; to reduce the same to writing and to close it up under your hand and seal, direct it to the clerk of our said court at Chattanooga; and that you return the same when executed as above directed annexed to this writ, with the title of the cause endorsed upon the envelope thereof, into the said circuit court before the judges thereof with all convenient speed.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Chattanooga, in the said district, this 16th day of August, in the year of our Lord one thousand eight hundred and eighty-four.

[Seal of the Circuit Court.]

A. R. HUMES,
Clerk U. S. Circuit Court, Eastern District of Tennessee,
By W. G. McADOO, JR.,
Deputy Clerk.

Endorsed: No. ---. Commission. State of Ala. *et als. vs.* Theo. G. Montague and others. Issued August 16th, 1884. A. R. Humes, clerk.

289 In the United States Circuit Court for the Southern Division of the Eastern District of Tennessee. In Equity.

THE STATE OF ALABAMA *et als. vs.* THEO. G. MONTAGUE *et als.*

STATE OF MASSACHUSETTS, } *ss:*
District of Massachusetts, County of Suffolk. }

Henry E. Waite, a witness called on behalf the plaintiffs herein, and residing at West Newton, Massachusetts, more than one hundred miles from the place where this cause is to be tried, being duly cautioned and sworn to tell the whole truth, and being carefully examined, deposes and says as follows:

1 Question. Please state your name, age, occupation, and residence.

Answer. My name is Henry E. Waite; age, 39 years; occupation, book-keeper; residence, West Newton, Mass.

2 Question. Please state if at any time you were connected
290 with a railroad formerly known as the Alabama and Chattanooga railroad; if you please, state what position or positions you occupied, at what point was your office, and how long you occupied the said position.

Answer. Yes, sir; I was local treasurer at Chattanooga, Tennessee, from January, 1869 to June, 1871.

3 Question. By whom were you appointed such local treasurer?

Answer. I received a verbal appointment from Isaac T. Burr, who was the treasurer of the Alabama and Chattanooga Railroad Company.

4 Question. Please state if at any time you testified or gave evidence in a suit pending in the United States circuit court for the southern division of eastern district of Tennessee at Chatta-
291 nooga, Tennessee, where all the same parties were interested, and where the same property was the subject of controversy—that is to say, that the property in Chattanooga known as the Spring property purchased by the Alabama and Chattanooga Railroad Company from J. P. McMillan.

Answer. I remember giving testimony in a case of that kind.

5 Question. Please state if within the last year *if* you have had any correspondence with J. C. Stanton in regard to the above-described property; if so, state what the correspondence was.

Objected to by counsel for defendants because J. C. Stanton is not a part of this suit, and any correspondence or any statements made by said Stanton would be irrelevant and incompetent as testimony.

Answer. Mr. J. C. Stanton wrote me some two or three months ago asking about this case. I have forgotten exactly the
292 words I wrote him in my answer, but the substance of it was that it related to the sale to Thomas Webster, of Chattanooga, of the land then known as the Spring property, in part payment of said Webster's bill for material furnished the Alabama and Chattanooga Railroad Company, and the present owners or trustees of the said railroad now claim the property under the two-million loan of the State of Alabama, as I understood it.

6 Question. Please state whether or not the Alabama and Chattanooga Railroad Company procured a loan from the State of Alabama for two millions of dollars in the bonds of the State of Alabama, and whether or not the said railroad company received the said bonds from the State.

Answer. Yes, to the best of my knowledge and belief.

7 Question. Please state if said Alabama and Chattanooga
293 Railroad Company executed a mortgage to the State of Alabama to secure the said loan.

Answer. Yes; to the best of my knowledge and belief, they did.

8 Question. Please state where, as local treasurer of said railroad company, you did your banking business.

Answer. With First National Bank of Chattanooga, Tennessee.

9 Question. Please state who were the president and cashier.

Answer. Mr. W. P. Rathburn was its president and Mr. Theodore G. Montague was its cashier.

10 Question. Please state if the railroad company did a large business with said bank.

294 Answer. Yes, sir.

11 Question. Please state the financial condition of Alabama and Chattanooga Railroad Company during the months of March, April, May, & June, 1871.

Answer. The company at Chattanooga was at the time short of money.

12 Question. Please state if the notes and drafts of said company were not, during the period above mentioned, protested at said bank.

Answer. I could not give the exact dates of the protest, but they were frequent between January and June, 1871.

13 Question. Please state, if you know, what property the Alabama and Chattanooga Railroad Company owned or had title

295 to in Chattanooga or in Tennessee during the years 1869, 1870, and 1871.

Answer. I do not know of any except the Spring property mentioned; by this I mean real estate. They had a large amount of personal property necessary for the construction and equipment of the railroad.

14 Question. Was it not the said property hereinbefore referred to as personal property necessary for the construction and equipment of the railroad covered by a first mortgage, by trust deed dated in or about the year 1868, and a second mortgage dated at the same date.

Objected to by counsel for defendants as the question calls for a question of an opinion on the part of witness, when the mortgages themselves will show if the property referred was included in it.

Objections overruled, and appeal prayed and granted.

296 Answer. I always understood so.

Cross-examination:

1 Cross-question. Was it not your duty as local treasurer of the Alabama and Chattanooga Railroad Company to take charge of all papers relating to land, and of all bonds for title and deeds and other instruments by which the road acquired any title to land registered, and were you not the custodian of such papers?

Answer. It was whenever I paid money out, but in case where I made drafts on the general office on Boston or New York, it was customary to forward vouchers to that office.

2 Cross-question. Do you remember how McMillan was paid for the Spring property?

297 Answer. I do not remember whether he was paid by draft on Boston or New York or by my check on the First National Bank of Chattanooga.

3 Cross-question. If paid by your check on First National Bank at Chattanooga, you would have retained the voucher for such pay-

ment, but if paid by draft on Boston or New York, you would forward such voucher to officer upon whom you — drawn?

Answer. In either case I should forward a voucher of that kind to the general office with my monthly report.

4 Cross-question. Do you remember distinctly the circumstances attending the McMillen purchase, whether or not any voucher was given for the first payment of three thousand dollars, and if any was given the form of the same?

Answer. I do not remember the circumstances distinctly,
298 it was so long ago. But I should not have paid out the three thousand dollars without a voucher of some kind.

5 Cross-question. Was it not your custom to have registered deeds, bonds, and titles for lands purchased by the railroad company?

Answer. I don't remember ever having done so.

6 Cross-question. Do you state that a voucher was given for said three thousand dollars from your recollection of the fact, or do you state from your habit of taking vouchers for the payment of money?

Answer. From my habit of taking vouchers for payment of money.

HENRY E. WAITE.

Subscribed and sworn to before me this third day of Sep-
299 tember, A. D. 1884.

[SEAL.] JAS. B. BELL,
Commissioner.

Adjournment.

Not being able to complete the taking of further evidence by reason of the absence of witnesses, I adjourned the further taking of testimony until Thursday, September 4th, 1884, at ten o'clock, a. m., then to be continued at the American House mentioned in the annexed notice, being the same place where commenced.

Boston, September 3d, 1884.

JAS. B. BELL,
Commissioner.

Pursuant to the adjournment as above stated, on this fourth day of September, A. D. 1884, at ten o'clock in the forenoon, at the American House, not being able to complete the taking of said depositions by reason of the absence of witnesses, I adjourned the further taking of the same until to-morrow, Friday, September 5th, 1884, then to be continued at the same place (American House) mentioned in the annexed notice.

Boston, September 4th, 1884.

[SEAL.] JAS. B. BELL,
Commissioner.

300 Pursuant to the adjournment as above stated, on this fifth day of September, A. D. 1884, at ten o'clock in the forenoon, at the same place (American House, Hanover street, in Boston), I continued the taking of said deposition as follows:

ISAAC T. BURR, a witness on behalf of the plaintiffs herein, and residing at Newton, Massachusetts, more than one hundred miles

from the place where this cause is to be tried, being duly cautioned and *truth* to tell the whole truth, and being carefully examined, deposes and says as follows:

1 Question. What is your name, age, residence, and occupation?

Answer. My name is Isaac T. Burr; age, 56; residence, Newton, Massachusetts; occupation, president of a bank.

2 Question. State whether or not you were at any time connected in any way with the railroad called the Alabama and Chat-
301–2 tanooga railroad, having terminal points at Chattanooga, Tennessee, and Meridian, Mississippi, and running through the States of Tennessee, Georgia, Alabama, and Mississippi; if you answer you were connected, please answer what position or positions, if more than one, you occupied in relation to said road, when you entered on the duties of such position or positions, the date as near as may be from the best evidence you have; state how long you were connected with said road; give the date as near as you can when you severed your connection with said road.

Answer. I was. I acted as director there for a short time. I don't recollect the date. That I don't remember how long I was connected with said road. I don't remember the time I severed my connection with said road.

3 Question. State whether or not you occupied any other position than as director of said road.

303 Answer. Yes; I did. I acted as treasurer.

4 Question. State whether or not, if you know the fact as such treasurer, the Alabama and Chattanooga Railroad Company executed two mortgages on or about December 19th, 1868; if so, please describe them.

Objected to by counsel for defendants because the mortgages themselves will show the dates of their execution.

Answer. I remember some mortgages were made, but I don't recollect the dates or the amount.

5 Question. Please state if you were a director during the month of January, 1869?

Answer. I am not sure that I was.

6 Question. Please state if you were acquainted with John C. Stanton; if so, please state what position or positions, if any, he held in said Alabama and Chattanooga railroad during the year 1869.

304 Answer. I was; I don't know what position he held.

7 Question. Do you know whether John C. Stanton ever held the position of general superintendent of the Alabama and Chattanooga railroad?

Answer. I do not.

8 Question. As a director of said railway company, did you ever have any business connection with John C. Stanton in any way pertaining to said railway company?

Answer. I had no particular business with him.

9 Question. Did you have any?

Answer. Mr. Stanton was very active about the road. I don't remember anything very particular that I had to do with him.

10 Question. If you know in any way what position J. C.
305 Stanton occupied to the A. & C. railroad during the latter part of the year of 1868 and the early part of 1869, please state them; say, the months of January and February.

Answer. I do not.

11 Question. Please examine the paper-writing handed you, purporting to be a general power executed by the board of directors of said road, dated Boston, January 26th, 1869, giving certain powers to the general superintendent, and say if you ever knew of the existence of such authority before this day; and, if so, how.

Answer. I have no recollection of such authority or of such paper.

12 Question. Please annex said paper-writing to your deposition and make it a part of your deposition.

Answer. The paper is no part of my deposition. I have no authority over it. It is not in my possession, and does not belong to me.

306 13 Question. Do you decline to annex the paper-writing handed to you?

Answer. I have no objections to the paper being put in, but I decline to put it in myself.

14 Question. Please state if, in the examination, have you appeared as a witness, having counsel, and, before answers were given to questions asked you, you consulted your counsel before making answer thereto.

Answer. Before answering some questions I consulted counsel.

By Counsel for Plaintiffs: The general interrogatory under rule 71 is hereby waived by plaintiffs and defendants.

I. T. BURR.

Subscribed and sworn to before me, at Boston, this fifth day of September, A. D. 1881.

JAS. B. BELL,
Commissioner.

307 Samuel A. Carleton, a witness called on behalf of the plaintiffs herein, and residing at Boston, Massachusetts, more than one hundred miles from the place where this cause is tried, being duly cautioned and sworn to tell the whole truth, and being carefully examined, deposes and says as follows:

1 Question. What is your name, age, residence, and occupation?

Answer. Samuel A. Carleton; age, 56 years; residence, Boston, Mass'u'ts; president of a bank.

2 Question. Please examine the deposition of Mr. I. T. Burr in this cause, and especially that portion of it referring to a paper-writing purporting to grant authority to the general superintendent of the Alabama and Chattanooga Railroad Company, and say, if you know, if any such authority being granted by the board of directors of said road, and state if you were director at that time, to wit, January 26th, 1869.

308 Answer. I do not recollect of any such paper, but think I was acting as director at that time.

BY THE COUNSEL FOR PLAINTIFFS: *To* the general interrogatory under the equity rule of the United States circuit court is hereby waived by complainants and defendants.

S. A. CARLETON.

Subscribed and sworn to before me, at Boston, this fifth day of September, A. D. 1884.

JAS. B. BELL,
Commissioner.

In the United States Circuit Court for the Southern Division of the Eastern District of Tennessee. In Equity.

THE STATE OF ALABAMA *et als. vs.* THEO. G. MONTAGUE *et als.*

STATE OF MASSACHUSETTS,
District of Massachusetts, County of Suffolk, City of Boston, } *ss:*

309 I hereby certify that on the third, fourth, and fifth days of September, before me, James B. Bell, a commissioner, at the American House, Hanover street, in room No. 27, in the city of Boston, in the county of Suffolk and State of Massachusetts, personally appeared before me, pursuant to the notice hereto annexed, between the hours of ten a. m. and six p. m., Henry E. Waite, Isaac T. Burr, and Samuel A. Carlton, three of the witnesses named in said notice, and D. Y. Duffy, Esquire, appeared as counsel for plaintiffs, and X. Wheeler, Esq., appeared as counsel for defendants, and A. A. Ranney appeared as counsel for Isaac T. Burr and Samuel A. Carlton, witnesses in said cause; and the said Henry E. Waite, Isaac T. Burr, and Samuel A. Carlton, being by me first duly cautioned and sworn to testify the whole truth, and being carefully examined, deposed and said as appears by the depositions hereto annexed.

310 And I further certify that the said depositions were then and there reduced to writing by me, and that the said Isaac T. Burr, before answering to the interrogatories proposed to him, consulted his counsel (A. A. Ranney) outside of the room before answering the questions propounded to him, and was then and there, after it had been reduced to writing, *and* subscribed by the aforesaid witnesses.

And I further certify that the reason why the said depositions were taken was that *the said depositions were taken was that* the said witnesses reside in the State of Massachusetts, more than one hundred miles from the State of Tennessee, the place where this cause is to be tried.

And I further certify that the fees and charges, $15.36, for taking said depositions has been paid to me by the plaintiffs, and the same is just and reasonable.

In witness whereof I have hereunto set my hand and affixed

my official seal, at the city of Boston, in the county of Suffolk and State of Massachusetts, on this fifth day of September, A. D. 1884.

[SEAL.] JAS. B. BELL,
Commissioner.

311 Endorsed: John Swann *et als. vs.* T. G. Montague *et als.* Depositions of H. E. Waite, I. T. Burr, S A. Carlton.

THE UNITED STATES OF AMERICA, }
Northern Division of the Eastern District of Tennessee, } *ss:*

Be it remembered that on the third day of October, 1884, before me, Harry W. Durand, a notary public in and for Hamilton county, Tennessee, at Chattanooga, Tennessee, was produced and personally came John C. Woodruff, witness on the part and behalf of the complainants in a certain suit, now depending and undetermined in the circuit court of the United States for the eastern district of Tennessee, wherein The State of Alabama and John Swann & John A. Billups, trustees and assignees, are compl'ts, and Theo. G. Montague and others are defendants, to depose and the truth to say in said suit.

And therefore the said John C. Woodruff, being of lawful age and sound mind, being by me first cautioned and sworn to testify
312 the truth, the whole truth, and nothing but the truth touching the matters in controversy in said suit, did, in answer to the several interrogatories and cross-interrogatories herein propounded to him, depose and say as follows:

Question 1st. Please state your name, age, residence, and occupation.

Answer. J. C. Woodruff; seventy-two years; accountant; Chattanooga, Tennessee.

Question 2nd. State whether or no you were in the employ of Thomas Webster, at Chattanooga, Tennessee, during the year 1870; if so, in what capacity?

Answer. I was book-keeper for Thos. Webster in 1870.

Question 3rd. Please state if the said Thomas Webster did any business with the Alabama & Chattanooga Railroad Company at Chattanooga, Tenn., during the months of February, March, April, May, June, and July, in the year 1870; if so, what kind of business?

Answer. Thomas Webster was engaged in running a foundry and machine shop, and made for the Ala. & Chattanooga R. R. Co. cars, railroad castings, engine machinery, and general repairs for
313 the railroad company during the months of February, March, April, May, June, July, and August, 1870.

Question 4th. As the book-keeper or accountant for said Thomas Webster, did you have charge of the said Webster's books in which the accounts with said Ala. & Chatta. R. R. Co. *was* kept, and were said books of the said Webster under your charge and kept by you during the time hereinabove referred to.

Answer. The books were under my charge, and kept in the office of Thomas Webster, and the books were kept by me in the year here referred to.

Question 5th. If you have any means of telling, or recollect how settlements were made by said Webster with said railroad Co., you will state how the same were made during the time above referred to.

Answer. The settlements were made monthly, and the accounts were presented by me as bookkeeper to the R. R. Co. monthly and settlements made.

Question 6th. As such book-keeper, if you know how said railroad company paid their accounts to said Webster, you will please state how, when, and in what the payments were made, whether in
314 cash or other things, during the time hereinabove referred to.

If you have any means or date by which you can give the account of said railroad company with said Webster during the months referred to, you will please give the amount of each month separate, show how payments were made by said company, and when; and you will also state if you testify from memory or from the books. If you say that from an examination of the books, you will then please state when you examined said books, and where.

Answer. I give here the statement from the books kept by me now in office of Messrs. Barton, Andrew & Barton in Chattanooga, Tenn., as follows:

February, 1870.	Acc't this month			6,152 67
	Paid in cash.			
March, 1870.	Acc't for this month			6,314 21
	Paid in cash.			
April & May.	Acc'ts			8,058 87
	Paid in cash in full.			
June, 1870.	Acc't			3,819 08
	Paid in cash.			
July, 1870.	Acc'ts for this month			4,161 86
	Paid in scraps	169 92		
	60-day d'ft on Boston	2,000 00		
	90-day d'ft on Boston	1,991 94		
				4,061 86

315 The settlements were made as above on or about the time of presentation of each month's account.

Question 7. You show in the July account two time drafts were given by said railroad company in settlement of Webster's account for the month of July, 1870, due respectively at 60 and 90 days. Please state, if you know, whether or not said drafts were paid at maturity. You will also state if this is the first time that time drafts were given to said Webster during the time mentioned, and is it not a fact that the A. & C. R. R. Co. paid said Webster's accounts promptly upon presentation of the same during the time mentioned, and that the time hereinabove referred to was the only time that time drafts were given for the period referred to, to wit, for all accounts due said Webster from said railroad company for the months of February, March, April, May, June, and July, 1870.

Answer. I think the drafts given for the settlement of the July account of 1870 was paid at maturity; this was the first draft on

notes given in settlement for the monthly accounts of the company, as shown by the books.

316 Question 8. please state when you examined said books to refresh your memory, and if the account as hereinabove shown was taken from said books.

Answer. I examined the books October 3rd, 1884, from which the statements herein are given.

Cross-examined by sol. for def'ts:

Quest. 1. Do you know if the A. & C. R. R Co. was indebted largely to Thomas Webster in February, 1871? If so, state how the indebtedness was induced and how the same was satisfied.

Ans. The A. & C. R. R'd was indebted to Thomas Webster at that time about sixteen thousand dollars; a part of the amount, about thirteen thousand dollars, was paid by a parcel of land, 22 acres, situated in the 5th ward, transferred to said Thos. Webster. The indebtedness was evidenced by notes and accounts of said Webster against the A. & C. R. R'd Co.

JOHN C. WOODRUFF.

317 Subscribed and sworn to before me this 3rd day of October, 1884.

HARRY W. DURAND,
Notary Public.

Witness fee paid by D. J. Duffy.

Formal caption, certificate, and general interrogatory waived. All that is required is that the witness swear to the deposition before a notary public, and it shall then be filed and have the same force and effect as if formally taken.

[Seal of Notary Public, Hamilton Co.]

SAM'L G. RICE &
PHELAN & GOREE, *Att'ys*, &
D. J. DUFFY.
WHEELER & MARSHALL,
Sol's for Def'ts.

Notary public fees, $2.00, p'd by plaintiff.

Endorsed: In equity. No. 73. In the United States cir. court for the southern division of the eastern district of Tennessee. State of Alabama *vs.* T. G. Montague *et als.* Deposition of J. C. Woodruff. Received unsealed from the hands of H. W. Durand, notary public, this 3rd day of Oct., 1884, and filed same day. W. G. McAdoo, Jr., deputy clerk. State of Alabama *et al. vs.* T. G. Montague *et al.*

318 UNITED STATES OF AMERICA, *Eastern District of Tennessee:*

The President of the United States of America to H. L. Wheeler and H. A. Sharpe, Greeting:

Know ye that we, in confidence of your prudence and fidelity, have appointed you commissioner, and by these presents do give

you, or either of you, full power and authority diligently to examine upon their corporal oaths or affirmations, before you to be taken, Wm. H. Smith, as witnesses on the part of the plaintiffs in a certain cause now pending undetermined in the circuit court of the United States for the eastern district of Tennessee, in the sixth circuit, wherein the State of Alabama and others are plaintiffs and Theodore G. Montague and others are defendants, touching the premises.

And we do hereby require you, before whom such testimony is taken, to reduce the same to writing, and to close it up under your hand and seal, directed to the clerk of our said court at Chattanooga, and that you return the same when executed as above directed annexed to this writ, with the title of the cause indorsed upon the envelope thereof, into the said circuit court, before the judges
319 thereof, with all convenient speed.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Chattanooga, in the said district, this 20th day of September, in the year of our Lord one thousand eight hundred and eighty-four.

[Seal of the Circuit Court, East. Dist. Tenn., Southern Div.]

A. R. HUMES,
Clerk U. S. Circuit Court, Eastern District of Tennessee,
By W. G. McADOO, Jr.,
Deputy Clerk.

Endorsed: No. —. Commission. The State of Alabama *et als. vs.* Theo. G. Montague *et als.* Issued Sept. 24th, 1884. W. G. McAdoo, dept. clerk.

In the Circuit Court of the United States for the Southern Division of the Eastern Dist. of Tenn., at Chattanooga, Tenn.

THE STATE OF ALABAMA *et als vs.* THEO. G. MONTAGUE.

Deposition of Wm. H. Smith, taken, on behalf of compl'ts, under a commission duly issued to H. L. Wheeler and H. A. Sharpe, or either of them, and which commission is hereto appended
320 and made a part hereof, and under the several agreements between the attorn*ies* in this cause, and are now on file in this cause, and an agreement made between counsel in this cause on the 15th of Sept., 1884, and which is filed, with the depositions of Robert McKee and others, in Montgomery, Ala.

The said Wm. H. Smith, being produced before me at Birmingham, Alabama, on the 22nd day, of September, 1884, and being first duly sworn, depo*ses* and says:

The comp-ainants were present by D. J. Duffy, ag't for the complainants, and Xen. Wheeler, attorney for defendants.

Question by D. J. DUFFY: State whether or not you were the Governor of Alabama at the time of the passage of the act known as the act "To loan the credit of the State of Alabama to aid in the construction of the Alabama & Chattanooga railroad, and known as the two million act, passed February 11th, 1870; if yes, state how long before and after that time.

321 Answer. I was Governor of the State of Alabama at the time, and had been previous thereto from July, 1868, and after that time until November, 1870.

Question by Mr. D. J. DUFFY: Please tell, as fully and particularly as you can, the whole history of said act; how it came about; who suggested it; on whose application was the bill introduced in the Legislature of Alabama; in fine, tell, minutely and particularly, any and everything you may know about the legislation as to said act, from its inception to the passage of said act?

Answer. I do not remember the whole history of the transaction. I remember very few facts. I remember such a bill was introduced in the Legislature and passed. I do not remember who introduced it in the Legislature. I have a general recollection that it was introduced at the instance of John C. Stanton, in the interest of the Alabama and Chattanooga Railroad Company. I remember there was opposition to the bill, and that it was pending for some time, and that it passed the Senate for three millions of dollars, and,
322 finally, passed both houses for two millions of dollars. I think there was a great deal of lobbying in the Legislature about the bill; that is my recollection, but I cannot call to mind the various persons engaged in the lobbying. I only remember John C. Stanton and Thos. G. Carlisle; they *approved* to be active in procuring the passage of the bill.

Question. Pending the legislation that resulted in the passage of said act, please tell if anything was said as to what security the railroad company could or would give to the State of Alabama to secure the State for the bonds to be issued to the railroad company under and by virtue of said act; if so, tell what it was and by whom, as minutely and particularly as you can.

The question objected to by counsel of defendants, because the act will speak for itself.

Answer. Pending the legislation, I have a general recollection as to the securities to be offered to the State for the issuance
323 of said bonds, and my recollection is that the Ala. and Chatt. R. R. Co. was to mortgage all of the property owned by the company in Alabama, Mississippi, Georgia, and Tennessee. I remember distinctly that the company was to mortgage its lands, telegraph poles, and wires and apparatus. I am not positive as to the apparatus, but I think it was included with the poles and wires.

Question. State whether or not the said Alabama and Chattanooga Railroad Company duly executed said mortgage to the State of Alabama in pursuance of said act; and you will also please state if said two million bonds were issued by the State of Alabama and delivered to the said railroad company in compliance with said act?

Objected to by counsel for defendants, because the mortgage itself will show whether or not it was duly executed, and the bonds themselves will show if they were delivered in compliance with said act.

Answer. My recollection is that the Alabama and Chattanooga

Railroad Company executed the mortgage in pursuance of
324 said act and that the bonds of the State of Alabama were delivered for two million of dollars to the Alabama and Chattanooga Railroad Co.

Question. As the Governor of the State of Alabama—in your official capacity as such—state whether or not you know of any incumbrances upon said railroad, by mortgage or otherwise, prior to the two million mortgage; if so, please state the nature of said incumbrances to the best of your recollection?

Answer. I know of no incumbrances upon the Alabama and Chattanooga Railroad Co., except the 1st mortgage bonds of said company endorsed by the State of Alabama that I now remember.

WM. H. SMITH.

THE STATE OF ALABAMA, *Jefferson County:*

Now, therefore, I, H. L. Wheeler, the commissioner named in said commission hereto annexed, do certify that on the 22d day of Sept., 1884, at my office, in Birmingham, Alabama, caused the said witness, W. H. Smith, who is personally known to me to be the witness named in said commission, and having first sworn him to
325 speak the truth, and nothing but the truth, did reduce to writing the answers of said witness, in his own language, as near as possible, which were read over to him and sworn to and signed by him in my presence, and are hereto appended. I further certify that I have personal knowledge of the personal identity of said witness, and that I am not of counsel or kin to any of the parties to the cause, nor in any manner interested in the results thereof.

Given under my hand and seal this 22 day of Sep't, 1884.

[Seal of Notary Public.]

HENRY L. WHEELER,
Commissioner and Notary Public for Jefferson County, Alabama.

Endorsed: John Swann *et al. vs.* T. G. Montague *et als.* Deposition of Wm. H. Smith.

THE UNITED STATES OF AMERICA, }
Northern Division of Eastern District of Tennessee, } *ss:*

Be it remembered that on the 2nd day of October, 1884, before me, Harry W. Durand, a notary public in and for Hamilton
326 county, Tennessee, at Wheeler & Marshall's office, in Chattanooga, Tennessee, was produced, and personally came, A. M. Johnson & J. L. McCollum, witnesses on the part and behalf of the complainants in a certain suit now depending and undetermined in the circuit court of the United States for the southern division of the eastern district of Tennessee, wherein the State of Alabama and John Swann & John A. Billups, trustees and assignees, are complainants and Theo. G. Montague and others are defendants, to depose, and the truth to say, in said suit.

And thereupon the said A. M. Johnson and J. L. McCollum, both being of lawful age and sound mind, being by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the

trouth touching the matters in controversy in said suit, did, in answer to the several interrogatories and cross-interrogatories herein propounded to him, depose and say as follows—

The said A. M. JOHNSON:

Question 1st. Please state your name, age, and residence
[Answer.] A. M. Johnson; 53 years; Chattanooga.

Question 2nd. State if at any time you were connected with
327 a railroad known as the Alabama and Chattanooga Railroad Company; if so, please state in what capacity. If you say you were connected with said railroad company, please state, if you know, where the shops, offices, &c., of said railroad company in Chattanooga, Tennessee, were situated—upon what property, if you know. And you will also state, if you know, when said company commenced the erection of said buildings. Give, as near as may be, the date?

[Answer.] I held the office of superintendent of transportation upon the road known as the Alabama & Chattanooga R. R. in 1868 & '9; parts of each of these years. The shops of the road at that time were between Montgomery avenue & Hook Str., alongside N. & C. R. R.; the offices at that time were in a frame building north of Hook Str., known as the Wormecut property. The shops were commenced in 1869; also foundations of permanent offices.

Question 3. State whether or not you know of the property purchased by the Alabama and Chattanooga Railroad Company from J. P. McMillen, and known as the Spring property; if so, state if it was ever used by the Alabama & Chattanooga Railroad Com-
328 pany for railroad purposes, or in *connected* with their railroad in any way. How far is said property from the tracks or railway of the A. & C. R. R.? Please state, if you know, if said lands known as the Spring property were ever connected in any way with or used in the running or operating of said Alabama and Chattanooga Railroad Company.

Ans. I know the property described only in a general way; do not know exact boundary. It was never used for railroad purposes; does not join their land. I think it 800 to 1,000 ft. away from tracks of R. R.

Question 4. Please state, if you know, whether or not grading was at one time commenced by A. & C. R. R. Co. from near the old tannery on the Nashville and Chattanooga Railroad Company in the direction of said Spring property; if so, when? You will please state whether or not it was abandoned, and the improvements of said road placed at another point, and what point; who was the owner of said property at the time said improvements were placed where they were placed; are they still on said property; who owns said property; is there now or was there ever any tracks or improvements placed on said Spring property by the said
329 A. & C. R. R. Co.?

Ans. Yes; grading was commenced at old tannery on N. & C. R. R., I think, in 1869, but abandoned in short time, only a small amount of work being done when purchase of land was con-

summated from Boyce & Whiteside estates lying between N. & A. and N. & C. R. R'*ay*, where the offices, depots, & shops are at this time. The spring property was not used.

Question 5. Who was said property purchased by, and when?

[Answer.] John C. Stanton negotiated sale, I think, in 1869.

Question 6. How far is said old tannery where the grading was commenced from the Spring property?

Ans. About two thousand feet.

Cross-examined by sol. of def'ts:

Quest. 1. When the spring property was purchased in 1869, was it not contemplated that the same would be used jointly by the A. & C. R. R. Co. and the East Tenn., Va. & Ga. R. R. Co. for depot purposes?

Ans. It was.

Quest. 2. Did not Mr. Calloway, the pres't of the East Tenn., Va. & Ga. R. R. Co., cause surveys to be made from a point on
330 the line of that road to the Spring property? Why was the location of the depot changed from the spring property to its present location?

Ans. Surveys were made; can't say by whose order. Mr. Calloway was called into counsel once in my presence, and preferred the present location.

Re-examined:

[Quest.] Please state who Mr. Calloway was, what position he held, if any, and, if connected with a railroad, what railroad. Did any other railroad join the A. & C. R. R. Co. in its present location prior to the 1st of January, 1872, in the purchase of the property and location of shops, and has the East Tennessee road ever had any shops — tracks on said Spring property or on the property where the A. & C. R. R. Co. were located after the Spring property was abondoned?

Ans. Mr. Calloway was then president of the East Tenn., Va. & Ga. R. R.; not that I knew of. The E. T., Va. & Ga. R. R. has never used the Spring property or the location chosen for depot, shops, &c., by the N. & C. R. R.

A. M. JOHNSON.

331 Subscribed and sworn to before me on this 2nd day of October, 1884.

[Seal of Notary Public, Hamilton Co.]

HARRY W. DURAND,
Notary Public.

Witness fee paid by D. J. Duffy.

J. L. McCollum:

Question 1st. Please state your name, age, and residence.

[Answer.] J. L. McCollum; 42 years old; Chattanooga, Tenn.

Question 2nd. State if at any time you were connected with a railroad known as the Alabama & Chattanooga Railroad Company. If so, please state in what capacity, and how long. If you say you

were connected with said road or company, please state, if you know, where the shops, offices, &c., of said road were located in Chattanooga, Tennessee; upon what property *is* said improvements located. And you will state, if you know, when said company commenced the erection of any of said buildings. Give, as near as you can, the date.

Ans. I was connected with the Alabama & Chatta. R. R. from autumn of 1868 to summer of 1871, and again about 8 months of 1872, first as book-keeper in transp't. department, afterwards as ass't
332 sup't & master of transportation. Shops of road were located fronting on Montgomery avenue, running back to Hook street, between N. C. & N. K. R'y & Cowoot streets. The work on shop was commenced early in 1869. Offices of the road were located upon the property known as the Wormecute property, just north of the shops, between Hook & Market streets.

Question 3. State whether or not you know of the property purchased by the A. & C. R. R. Co. from J. P. McMillen, and known as the Spring property. If so, state if it was ever used by the A. & C. R. R. Co. for railroad purposes, or in connection with their said railroad in any way. How far is said property from the tracks or railway of the said A. & C. R. R.? Please state if said lands, known as the Spring property, were ever connected with or used in the running and operating of said A. & C. R. R. Co.

Ans. I know of the property, but know nothing of the details of the purchase. It was never used by the A. & C. R. R. for practical R. R. purposes. Ground referred to is located about one-fourth of a mile from their tracks, & was never used in any way in operating of the road.

333 Question 4. Please state if you know whether or not grading was at one time commenced by the A. & C. R. R. Co. from near the old tannery on the Nashville and Chattanooga railroad in the direction of said Spring property; how far is said tannery from said Spring property. If so, state whether or not it was abandoned, and the improvements of said road placed at some other point; if so, where, are they still there, who owns the property now, and who owned it when said improvements were placed there?

[Answer.] Grading was at one time commenced by the Ala. & Chatt'a R. R. near the Tannery property, on N. & C. R. R., in the direction of the Spring property, but abandoned soon after work commenced; the property is between quarter & half mile from old tannery, & the improvements made or proceeded with between Montgomery avenue & N. & A. R. R.

Question 5. What was the financial condition of the A. & C. R. R. Co. during the year 1869 and up to the fall of 1870; did not they pay all their debts promptly up to that time?

[Answer.] Don't know what the general financial condition was, being employed in the transportation department; think the
334 pay rolls were always promptly met between the dates mentioned.

[Seal of Notary Public, Hamilton Co.]

J. L. McCOLLUM.

Subscribed and sworn to before me this 2nd day of October, 1884.

HARRY W. DURAND,
Notary Public.

Witness fee paid by D. J. Duffy.

Formal caption, certificate, and general interrogatory waived. All [that] is required is that the witnesses swear to the depositions before a notary, and the depositions may be filed and read upon *upon* the trial of this cause, *as* have all the force and effect as if formally taken.

This Octo. 2nd, 1884.

SAM'L F. RICE.
PHELAN & GOREE, &
D. J. DUFFY, *Att'y.*
WHEELER & MARSHALL,
Sol's for Def'ts.

Notary public fees paid by complainants.

HARRY W. DURAND,
Notary Public.

Endorsed: In equity. No. 73. In the U. S. circuit court for the southern division of the eastern district of Tennessee. State of Alabama *et als. vs.* Theo. G. Montague *et als.* Depositions of A.
335 M. Johnson and J. L. McCullum. Received unsealed from the hands of H. W. Durand, notary public, this 2nd day of Oct., 1884, and filed same day. W. G. McAdoo, Jr., deputy clerk.

THE UNITED STATES OF AMERICA, }
District of ——, } *ss:*

Be it remembered that on the 30th day of September, 1884, before me, Harry W. Durand, a notary public in and for said county and State, at Chattanooga, Hamilton county, Tennessee, was produced and personally came Jesse Blanton, a witness on the part and behalf of the complainants in a certain suit now depending and undetermined in the circuit court of the United States for the southern division of the eastern district of Tennessee, wherein The State of Alabama, John Swann, and John A. Billups, trustees, &c., are complainants, and Theo. G. Montague and others are defendants, to depose and the truth to say in said suit.

And thereupon the said JESSE BLANTON, being of lawful age and sound mind, being by me first cautioned and sworn to testify
336 the truth, the whole truth, and nothing but the truth touching the matters in controversy in said suit, did, in answer to the several interrogatories and cross-interrogatories herein propounded to him, depose and say as follows:

Question 1st. Please state your name, age, and residence.

Answer. I am 73 years old, and live near the Georgia State line, in Hamilton county, Tennessee, on the "Pike road."

Question 2. Please state if you know the property in Chattanooga, Tennessee, commonly called the "Big Spring property." If so, how

long have you known it; and you will also state if you ever owned or purchased any of said tract; if so, from whom, and when?

Answer. Yes, sir; I know it very well; have known it since 1872. I purchased from Mr. Montague, or his agent, a lot 60x110 in 1872; I think in October of that year.

Question 3. Please state if you ever improved the lot you purchased; if so, when?

337 Answer. Commenced to improve in 1872, I think, and am certain I moved into [it] in 1873—September, 1873.

Question 4. Please state, if you know, whether or not there is a large spring upon said tract of land.

Answer. There is a large spring on the said property of Montague & Co.

Question 5. Please state, if you know, whether or not there was a house over said spring; if so, state, if you know, when it was placed there, and by whom. Give the date as near as you can. Is it still over said spring? If you say it is not, then please state how and when it was removed.

Answer. There was a house over said spring; cannot be positive about the date, but should judge it was some time in the year 1874; it was placed there by Mr. Garrabrant & Son; the house washed away from the spring in the spring of 1875, and floated to near my property, where I tied it up, and what remains of said house is still there.

Question 6. Please state if any one authorized you to tie it.

Answer. No one authorized me to tie it at that time.

338 Question 7. Please state if at any time you occupied said spring house; if so, when; give the date as near as you can when you first occupied it, and for what purpose; how long did you occupy it for that purpose. If you occupied it in any other way you will please state how you occupied, and for how long.

Answer. I did occupy it; I put in a crop of corn in the fall of 1878 in said house and occupied it for about one year; some time afterwards, I cannot give date, I commenced to use it for stabling my stock, and so used it for about one year and a half.

Question 8. Do you mean by your former answer that you used said spring house as a corn-crib or to store your crop of corn during the year 1878?

Answer. That is my meaning.

Question 9. Please state how long it is since you used said building as a stable. Please give as near as you can the date.

Answer. It has been nearly, or quite, three years since I occupied it as a stable; I had not used it for one year before leaving there, and I have been away from there two years.

339 Question 10. Please state by what authority you occupied it. Did you rent it; if so, from whom?

[Answer.] I did not rent, and did not go to any person for permission to use it.

Question 11. Please state, if you know, how far this tract of land, commonly known as the Big Spring property, is from the A. & C. R. R., or what is now called the A., G. S. R. R. tracks?

Answer. It is a quarter of a mile from any railroad which I know, and between a quarter and a half a mile to the A. & C. railroad.

Question 12. Please state how long it is since you resided upon said property, or any part of it.

Answer. It will be two years in December next.

Question 13. Please state if when you first took possession of said spring house in the year 1878, there was any fence or any kind of an enclosure around said building; was the building locked, or was it open so that any one could occupy it if they wished?

340 Answer. In November, 1878, when I took possession of the building, there was no fence about it, and the building was not locked, and any one could get in who desired. It was open to the public.

Question 14. How and by what means, if any, do you fix the date you first occupied said spring-house building?

Answer. It was the year of yellow fever.

Cross-examination by def'ts solicitor.

Quest. 1. You speak of Garrabrant & Son putting up the house over the spring; do you know who hired them to put it up?

Ans. I do not know, but think I heard the old man Garrabrant say Mr. Montague had him put it up.

Quest. 2. Did you ever have any conversation with Mr. Montague or with Mr. Bradt about tieing up the house to keep it from floating away? If you did, state what agreement or understanding was arrived at.

341 Ans. I did not have any conversation with either of them about tieing up said house. It floated away, and I came down and told them, and got a rope and pulled the house back as near the spring as we could, and anchored it. This was a year or two before 1875. Afterwards, when the water receded, we put it over the spring.

Quest. 3. When was it the house floated to the place it now occupies?

Ans. It was in the spring of 1875.

Quest. 4. What use was made of the house from the spring of 1875 until you commenced using it for storing away your corn?

Answer. Nothing, as I remember, except when Captain Wright made brick there; he used the house to store his tools in.

Complainants except to the X-inter. No. 4 and all answers thereto, because the same is incompetent and irrelevant to the issues in this cause, and because a mortgagor and prioress are estopped from setting up any adverse possession to the mortgage.

SAM'L F. RICE &
PHELAN & GOREE, *Att'ys.*

342 Quest. 5. How long was Capt. Wright engaged in making brick, and when did he commence using the house for keeping his tools, and when did he discontinue using it for that purpose?

Ans. I think he must have begun making brick there in the

spring of 1875, immediately after the flood, and made brick there for two years; he used the house during this time as a tool-house.

Complainants except to the foregoing question and answer thereto, and to all questions and answers attempting to show adverse possession by the mortgagor or those claiming through or under him, for the *names* set forth in the foregoing exception to X-int. No. 4.

SAM'L F. RICE &
PHELAN & GOREE, *Att'ys.*

Quest. 6. Did you not have a conversation with Mr. Montague about using the house before you commenced using it for your corn, or as a place for stabling your horse?

Ans. I did not have any conversation with him about using it; I went to him once to buy it but he refused to sell.

343 Quest. 7. At what time did Garrabrant, Nath'l Bruce, Mrs. Anna Cole, Maria P. Shelly, Mattie Worthy or her husband, Sam. Worthy, Maggie Roberts, or her husband, William Roberts, commence to improve the lots sold to them and go into possession of their lots?

Ans. About 1873, except Garrabrant, who was there the year before; the balance all built at once. It was in 1872 Shelley, Cole, Roberts, and Worthy were building; Garrabrant was one year earlier.

Quest. 8. Have not the houses built by all the above-named parties, as well as the one built by yourself upon your lot, been continuously occupied ever since they were erected?

Ans. I think they have mostly been occupied from that time to this.

Re-examined:

Quest. 1. You say in answer to cross-interrogatory 4 that Capt. Wright made brick on said property in 1875 & 1876, and used said spring house as a tool-house. After he left it in 1876, who, if any one, used it until you used it for a corn crib in November, 1878, and was it locked, if not, and during that time?

344 Answer. No one used it, and it was not locked.

JESSE BLANTON.

Subscribed and sworn to before me this 30th day of September, 1884.

[Seal of Notary Public, Hamilton Co.]

HARRY W. DURAND,
Notary Public.

We, the attorn*ies* for the complainants and defendants in this cause, waive caption, certificate, & general interrogatory, and all is required that the witness swear to the deposition before a notary, and that the deposition shall have the same effect and force as if formally taken.

This Sept. 30th, 1884.

S. F. RICE, PHELAN & GOREE, *Att'ys.*
AND D. J. DUFFY.
WHEELER & MARSHALL,
Sol's for Def't.

Bill of Cost.

Notary public, 1,700 words, at 20c. a hundred	3 40
Swearing witness	10
	$3 50
Jesse Blanton, 1 day, witness	1 00
	$4 50

Paid by complainants.

Endorsed: In equity. , No. 73. In the U. S. circuit court for the southern division of the eastern district of Tennessee. State of Alabama *et als. vs.* Theo. G. Montague *et als.* Deposition of Jesse
345 Blanton. Received unsealed from the hands of H. W. Durand, notary public, this 30th day of Sept. 1884, and filed same day. W. G. McAdoo, Jr., deputy clerk.

THE UNITED STATES OF AMERICA,
Southern Division of the Eastern District of Tennessee, } *ss:*

Be it remembered that on the 29 day of September, 1884, before me, H. W. Durand, a notary public, at the office of Wheeler & Marshall, in the city of Chattanooga, Tennessee, was produced and personally came T. G. Montague, a witness on the part and behalf of the defendants in a certain suit now depending and undetermined in the circuit court of the United States for the eastern district of Tennessee, southern division, wherein the State of Alabama, John Swann, and John A. Billups, are complainants, and Theodore G. Montague and others are defendants, to depose and the truth to say in said suit:

And, thereupon, the said T. G. Montague, being of lawful age and sound mind, being by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth touching
346 the matters in controversy in said suit, did, in answer to the several interrogatories and cross-interrogatories herein propounded to him, depose and say as follows:

Interro. 1. What is your age, residence, and occupation, and are you one of the defendants to this suit?

Ans. My age is 47 years; I reside in Chattanooga, Tennessee; I am the president of the First National Bank; I am one of the defendants to this suit.

Interro. 2. State if you were one of the purchasers of the tract of 22 acres of land involved in this controversy, and, if you were, state how you became the purchaser, or one of them, of whom you made the purchase, and what the consideration was and how and to whom paid.

Ans. I was one of the purchasers of the 22-acre tract referred to. I became the purchaser at the solicitation of a real estate ag't, Morris Bradt. I bought from Thomas Webster; the consideration was $13,200, and was all paid in cash to the said Webster.

Interro. 3. State who conducted the negotiations on the part of the purchasers which led to trade.

Ans. I had more to do with it than Mr. Tower or Mr. Wheeler, but did not speak for any of the others, nor do I know who
347 did represent them. It was my understanding that the real estate agent canvassed until he found purchasers, and each one acted for himself, and not any one for all the others.

Interro. 4. At the time of the purchase what knowledge, if any, did you possess of any encumbrance or encumbrances upon the land, by mortgage or otherwise?

Ans. I had no knowledge of any mortgage or other encumbrance upon the land.

Interro. 5. At what time was the purchase made and what was the condition of the property at the time; what improvements, if any, were upon it; who had the possession of the land, if anyone?

Ans. The purchase was made on April 8, 1871; at that time the land was an open common; there were no improvements upon it, except some protection about a large spring that was upon this property; Thomas Webster was supposed to be in possession.

Interro. 6. What improvements, if any, were made upon the land by the purchasers from Webster, and when were such improvements made?

(Complainants object & except to the above question 6, & all answer thereto, because the same is incompetent, immaterial, and irrelevant to the issues in this suit.

PHELAN & GOREE, *Sols., &c.*)

348 Ans. Immediately upon the purchase we took possession and built a substantial house about 18 feet square over the spring, all enclosed by heavy plank on the sides, and shingle roof. This proof still stands upon the property, but it has been moved some distance from its original location by high water. Streets were laid out in 1871, and substantial posts placed at the corners of all streets, with boards across the top, with the names of the streets painted upon these boards. In April, 1871, the manufacture of brick was exclusively carried on, and this was continued for several years upon these premises under contract made with their brick-makers and myself, as att'y-in-fact for these purchasers.

Interro. 7. What division of the property, if any, was made by these purchasers, and when was the division made?

Ans. The tract was divided into blocks and numbered as follows: 1, 4, 5, 6, 8, 9, 10, and 11. Then these blocks were sub-divided in lots, generally about 50 feet by one hundred & five feet. This was completed in the summer of 1871.

349 Interro. 8. If you for yourself, and as att'y-in-fact for the other purchasers made any sales of lots, state to whom you made sales, the lots sold to each purchaser, and the date of each sale.

Ans. The following sales were made: June 1, Nathaniel Bince, lot No. 9, 55 by 105, in block No. 5. May 7, 1872, to Mattie Worthy, wife of Sam. H. Worthy, lot 2, bl'k 4, 50 by 105 feet. Oct. 31, 1872, to Jesse Blanton & his sons, D. F. Blanton & others, lot 16, block 9,

60 by 110 feet. April 24, 1872, to Thos. J. Carlile, lot —, bl'k 6. July 22, 1871, to Jacob Kauber, lots 1, in block 1, and Feb'y —, 1872, to same party, lots 2 & 3, in block 1. May 4, 1872, to Maria P. Shelley, lot 8, block 5. May 3, 1872, to Mrs. Anna Cole, lot 1, block 4. May 4, 1871, to Harriet E. Garrabrant, lot 1, block 9, & lot 2, bl'k 9. May, 1871, to Louis Aufreucht, lots 5 & 6, in block 1. June 3, 1872, to Wm. E. Roberts, lot 3, block 4. June 4, 1872, to J. E. & J. T.
350 Murphy, lots 4 & 5, in bl'k 4. April 2, 1873, to Mrs. Elizabeth Roberts, lot 15, bl'k 9. May 2, 1873, to R. B. Rawlston, lot 4, bl'k 1. Of the foregoing sales, Aufrecht, Kauber, and Mrs. Garrabrant paid cash and took deeds at the time of purchase. All others paid part cash, giving notes for balance, and to these I gave bond for title or deed, retaining lien for notes. Since then all except the following have paid these notes, and warranty deeds have been executed. Deeds were not made to Nathaniel Bruce, J. E. & J. F. Murphy, & —— Rawlston.

Interro. 9. State if any improvements were made upon the lot purchased by Bince, when such improvements were made, by whom, and the character of such improvements, and who now owns the property, and when the present owners purchased the same?

Ans. Bince built a substantial frame dwelling upon his lot in 1873. This house had two rooms on the ground floor, with double
351 chimney between the rooms, high attic over the room. Bince died before making the last payment, and by proceedings in court this lot was sold at public sale, and the same was bought by me as att'y for the owners on the — day of June, 1874. The original purchasers of this tract are still the owners of this Bince lot.

Interro. 10. How has the house and lot been used or occupied since the house was built?

Ans. I only know that since we became the owners it has been let to various persons as a residence, the present occupant, George Harris, has been in it several years.

(Complainants except and object to all answers to the foregoing int'g's 7, 8, 9, & 10 going to show any adverse possession of said lands by the defendants, or those claiming under them, because they are estopped to set up adverse possession against the mortgagee or the complainants claiming under the mortgagee, & because the said proof is immaterial, incompetent, and irrelevant to the issues in this suit.

PHELAN & GOREE,
Sol'rs for Compl'ts.

352 Interro. 11. State whether or not said house and lot has been continuously occupied since its purchase by the present owners?

Ans. It has been vacant for short periods at several different times, but except for short periods it has been continuously occupied by tenants of the owners.

Interro. 12. If you know, state which of said lots you sold have been improved, when the improvements were made, by whom made,

the character of the improvements, and if the purchasers from you or their heirs or assigns have been in possession since the date of your sale; state fully all you may know as to these lots.

Ans. Lot 2, sold to Worthy, was built upon in 1873; lot 16, sold to Blanton, was built upon in the summer of 1873; lot 8, sold to Maria P. Shelley, was built upon Sept., 1872; lot 1, sold to Mrs. Anna Cole, was built upon in 1872; lot 1, sold to Harriet E. Garrabrant, was built upon in 1871 or 1872; lot 16, sold to Blanton, was im-
353 proved by fencing same in Ap'l, 1873, and in the summer of 1873 a house was built; lot 3, sold to Wm. E. Roberts, was built upon in 1872 or 1873; all of said parties built one-story dwelling-houses for their own use, and they were occupied by them respectively for a longer or shorter period; all have been continuously occupied until now, but several of them have been resold to other parties unknown to me.

Interro. 13. From April, 1871, when you and other of the defendants became the purchasers of the tract in controversy, by whom have the taxes assessed upon the property been paid, and state the amount of the taxes so paid, as nearly as you can.

Ans. I have paid all of the taxes upon the unsold lots during this entire time, and have bought at tax sales some of the lots that I have sold; these lots had not been paid for when I bought them in; the taxes paid by us amounts to $2,133.

Interro. 14. Do you know, or can you set forth, any other matter or thing which may be a benefit or advantage to the parties at issue in this cause, or either of them, or that that may be material
354 to the subject of this, your examination, or the matters in question in this cause? If yes, state the same fully and at large in your answer.

Ans. I do not.

Cross-examination:

1 X Int'y. Please state what position, if any, you held in the 1st National Bank of Chat. during the years 1870 & 1871.

Ans. I was the cashier of said bank.

2 X Int'y. State whether or not the Ala. & Chat. R. R. Co. did its banking business at Chattanooga through said bank, & did the said company do a large business?

Ans. The A. & C. R. R. did their banking business through the First National B'k, and their business at this time was quite large.

3 X Int'y. What was the financial condition of the said Ala. & Chatt. R. R. Co. during the year 1871, & especially during the months of Feb'y, M'ch, April, & May of said year?

355 Ans. I cannot recollect; I may have known at that time, but have now no means of ascertaining what their financial condition was?

Int'y X 4. State whether or not their paper was protested during those months.

Ans. I do not recollect whether their paper was protested or not during those months.

5 X Int'y. Please describe the building you say was put on the land after you bought.

Ans. The house built over the big spring by us was of wood, planked on the outside with thick boards close together, probably 18 feet square, with a roof of shingles laid from the four sides, with usual slope to the center. This building has been occupied by squatters without our consent, but for quite a long time, as a stable, by permission of myself.

6 X Int'y. State whether or not you placed any one in the possession of said building before it was washed from the spring by high water.

Ans. Morris Bradt has charge of all of this property; he built the spring-house building, made all sales of lots, had control of the building, and by an agreement or understanding with all buyers of lots they were allowed to get water free; he contemplated
356 putting in a *ram* and forcing water from this spring to all that neighborhood when there was a population to justify such an investment.

7 X Int'y. Now, please tell whether or not Mr. Bradt took actual possession of the building. Was he in the building, or have any one staying in it, before it was washed away from the spring?

Ans. No one could live in this building while it was over the spring. The house had a door, and the door was so fastened that some one had to have control of it to allow of access to the water. I have no knowledge who Bradt had to represent him; I only knew Bradt as having the property in charge.

8 X Int'y. Now, is it not true that parties living in the neighborhood were constantly using the water from the spring before the building was washed away?

Ans. Water was hauled away in large quantities from low ground below the spring; this water was suitable for brick-yards or any similar purpose. Hogs were allowed at large, and all this waste water was not suitable for domestic uses, but was open to the
357 public, but the spring proper was not.

9 X Int'g. When was the building washed from over the spring, & how far away was it washed?

Ans. Washed away by the flood of 1875. Bradt tied it with ropes so that when the water receded it was left upon this same tract, but 100 feet or so from the spring.

10 X Int'g. How long was it after the flood that you saw squatters in the building?

Ans. Not long; cannot say what year; do not recollect.

11 X Int'g. How long did these squatters remain in the building without your permission?

Ans. I do not know how long this building was so occupied. Neighbors complained to me at two different times; and to keep it from being so occupied I authorized Mr. Blanton, who lived near, to take possession and use it as a stable.

12 X [Int'g.] Was it as long as a year after the building was washed away before Mr. Blanton used it as a stable? Tell as near as you can how long it was.

[Ans.] I think it was a year after it washed away before
358 Mr. Blanton took charge of it.

13 X Int'g. Are there any manufactures of brick on the land now; if not, how long has it been since the manufacture of brick was carried on on this tract of land?

Ans. No brick have been made upon this land since the summer of 1876.

And further deponent sayeth not.

T. G. MONTAGUE.

Sworn to and subscribed before me this 29th day of September, 1884.

[Seal of Notary Public, Hamilton Co., Tenn.]

HARRY W. DURAND,
Notary Public.

Formal caption and certificate to the above deposition are hereby waived, and the deposition may be filed among the papers. All that is required is that the said witness shall make oath to the deposition before a notary public, subject to all exceptions for incompetency & irrelevancy.

This 25 Sept., 1884.

PHELAN & GOREE,
Sol's for Compl'ts.
WHEELER & MARSHALL,
Sol's for Def'ts.

Bill of cost:

	N. P. fees, 2,100 words, 20 cts. a hundred	$4 20
359	Administering oath	10
		$4 30

Paid by defendants.

Endorsed: In the United States circuit court for the southern division of the eastern district of Tennessee. In equity. No. 73. The State of Alabama *et als. vs.* T. G. Montague *et als.* Deposition of T. G. Montague. Received unsealed from the hands of H. W. Durand, N. P., this 29th day of Sept., 1884, and filed same day. W. G. McAdoo, Jr., deputy clerk.

Pending in the United States Court at Chattanooga, Tenn.

JOHN SWANN *et als. vs.* T. G. MONTAGUE *et als.*

In order to save costs in this suit it is agreed that the complainants may introduce and read on the trial of this cause the following papers, to wit:

The act of the General Assembly of Alabama, as the same appears
in pamphlet form of an act to loan the credit of the State of
360 Alabama to the Alabama and Chattanooga Railroad Co., passed Feb'y 11, 1870; also a certified copy of a mortgage

executed by the Alabama and Chattanooga Railroad Co. to the State of Alabama in conformity to and in pursuance of said act of the General Assembly of Alabama hereinabove referred to, and commonly known as the ~~ten~~ Eight million gold bond mortgage.

Also a deed executed by J. P. McMillin, as certified by the register of Hamilton county, Tennessee, conveying the lands in controversy to the Alabama and Chattanooga Railroad Co., dated March 31st, 1870.

Also a copy of a deed from George S. Houston, as Governor of Alabama, to John Swann & John A. Billups, as trustees and assignees, conveying certain properties and rights therein specified, which said copy is attached to the deposition of John Swann taken in this suit.

Also copies of two separate mortgages, both bearing date Dec. 19, 1868, known as the first & second mortgages executed by the Alabama & Chattanooga Railroad Co., and referred to in said
361 gold bond mortgage.

It is also agreed that copies of any of the said papers found among the files of the suit in ejectment in said court between these same parties may be used if necessary or desired.

The said papers are admitted as the original, subject to objection for relevancy or competency.

It is also agreed that the defendants upon the trial of the cause may read as evidence the following certified copies of papers from the register's office of Hamilton county, Tennessee, the production of the originals being waived:

1. A paper-writing purporting to be the deed of the Alabama & Chattanooga R. R. Co. to Thos. Webster, by J. C. Stanton, att'y-in-fact, bearing date Feb'y 25, 1871, and of record in the register's office of said Hamilton county, in "book W," pages 39 & 40.

2. A paper-writing purporting to be a power of attorney from the Alabama & Chattanooga R. R. Co. to J. C. Stanton of date March 2, 1871, and of record in the register's office of said Hamilton
362 county, in book "U," pages 83 & 84.

3. Certified copies of any deeds that may have been executed by any of the defendants to purchasers of any portion or portions of the tract of land involved in this controversy, which copies shall have the same force and effect as the original deed.

4. The defendants may also read any papers purporting to be deeds or copies of deeds, evidences of title as evidence formal in the file of the ejectment suit brought by compl'ts against same def'ts in the U. S. circuit court at Chattanooga, numbered "6," including the original deed from Thos. Webster to T. G. Montague & others of the land involved in this controversy, dated April 8, 1871.

All of the above-named papers are subject to all objections for competency and relevancy.

PHELAN & GOREE,
Sol's for Compl'ts.
WHEELER & MARSHALL,
Sol's for Def'ts.

363 Endorsed: No. 73. John Swann *et als.* vs. T. G. Montague

et als. Agreement of counsel. No. 1. Filed Oct. 7, 1884. W. G. McAdoo, Jr., deputy clerk.

In the Circuit Court for Southern Division, Eastern District of Tennessee.

STATE OF ALABAMA *et als. vs.* T. G. MONTAGUE *et als.*

It is agreed that sales were made of the several lots and parts of the tract of land in controversy in this cause, as stated in the deposition, of T. G. Montague taken and filed in this cause, and on the respective dates therein named, and the bonds and deeds therein stated executed therefor and duly registered, and that title to said lots and parts of said tract have passed to the several defendants now claiming the same by mesne conveyances duly registered; and the production and reading of the original bonds and deeds evidencing said sales and transfers or copies thereof in evidence on the trial of this cause is waived.

364 It is also admitted and agreed that there are two thousand bonds of $1,000.00 each, with interest coupons attached, falling due June 1st, 1876, and each six months thereafter until December 2d, 1899, of like amounts and similar in all respects to the bond, with coupons attached, which is made Exhibit "C" to deposition of John C. Stanton on file in this cause, now in the hands of Swann and Billups, trustees, &c., said bonds issued by the Alabama & Chattanooga Railroad Company; and it is agreed that said bond filed as such exhibit to said deposition may be read in evidence on the trial of this cause, as representative of the whole of said series of bonds, and the production and rending of the others of said series is waived.

This October 8th, 1884.

S. F. RICE & PHELAN & GOREE,
Sol's for Compl'ts.
WHEELER & MARSHALL,
Sol. for Montague & other Def'ts.

[Endorsed:] No. 73. Swann *vs.* Montague. Filed October 8, 1884. W. G. McAdoo, Jr., deputy clerk. No. 2.

365 Know all men by these presents that we, John Swann, C. P. Goree, John Phelan, are held and firmly bound unto T. G. Montague, Xen. Wheeler, G. M. Sherwood, Frederick Wolffe, assignee, &c.; T. G. Montague, Xenophon Wheeler, Thomas Webster, Geo. M. Sherwood & wife, Sarah M. Sherwood; Marion Carlile, W. W. Yonge, & wife, Nellie Yonge; Cornelia & Eloise Carlilse, D. F. Blanton, Mattie Worthy & husband, Sam'l Worthy; Anna Cole, Thos. Lane, Geo. Harris, Chas. Paxton, Maggie Roberts — husband, — Roberts; Jacob Peyer, Jacob Kruber, J. Kechner, W. J. Keilin, N. D. Congle, J. Foster Rogers, Maggie Roberts, William Roberts, O. L. Wagner, D. C. McMillin, Jr., J. P McMillen, Jas. A. Bass, Isaac H. Tower, Lewis Anfrecht Charles Woodburry, Bradford Post, Walter Carlile, Albert D. Mahoney, in the full and just sum of five hundred dollars, to be paid to the said T. G. Montague, certain attorney, executors, administrators, or assigns;

to which payment well, and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this ninth day of October, in the year of our Lord one thousand eight hundred and eighty-four.

Whereas lately at a term of the United States circuit court for the eastern district of Tennessee, held at Chattanooga, in a suit depending in said *suit* between The State of Alabama, John Swann, and John A. Billups, trustees & assignees, complainants, and T. G. Montague *et als.*, a decree was rendered against the said complainants dismissing the bill of complaint, and the said complainants in open court having prayed an appeal from said decree to the Supreme Court of the United States, to be holden at Washington the second Monday of October inst.:

Now, the condition of the above obligation is such that if
366 the said The State of Alabama & John Swann & John A. Billups, trustees & assignees, shall prosecute their appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN SWANN. [SEAL.]
C. P. GOREE. [SEAL.]
JOHN PHELAN. [SEAL.]

Sealed and delivered in presence of—

Approved by— JNO. BAXTER,
Judge, &c.

Endorsed: John Swann *et als. vs.* T. G. Montague *et als.* Appeal bond.

367 UNITED STATES OF AMERICA, } *ss:*
Circuit Court, East'n District of Tennessee, }
CLERK'S OFFICE.

I, A. R. Humes, clerk United States circuit court for the eastern district of Tennessee, do hereby certify that the foregoing is a full, true, and perfect copy of the orders and decrees as the same appear of record in my office, and of the papers on file deemed necessary by the parties for the prosecution of the appeal in the case wherein The State of Alabama is complainant and T. G. Montague *et als.* are defendants.

In testimony whereof I hereunto subscribe my name officially and affix the seal of said court, at Knoxville, within said district, on this the 22nd day of January, 1885.

[The Seal of the Circuit Court, District of East Tennessee.]

A. R. HUMES,
Clerk U. S. Circuit Court, East'n Dist. of Tennessee.

Endorsed on cover: E. Tennessee C. C. U. S. No. 984. The State of Alabama, John Swann, and John A. Billups, trustees and assignees, appellants, *vs.* T. G. Montague *et al.* Filed September 29, 1885.

18—984

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

THE STATE OF ALABAMA, JOHN SWANN, and JOHN A. BILLUPS, Trustees, &c.,
vs.
T. G. MONTAGUE *et als.*
} No. 984.

We, the attorneys and solicitors of the respective parties to the above-entitled cause, have discovered divers omissions and mistakes in the printed record of this cause now pending in said Supreme Court, some of which are readily corrected by the intelligent reader, by the aid of the record as a whole, but others of which require an agreement of the attorneys for their correction. Now, we hereby agree to and make the following corrections:

1. On page 59 of said printed record 1878 must be stricken out and 1870 inserted in lieu thereof.

2. On page 86 the bond numbered 1990, which was made a part of the deposition of J. C. Stanton, and marked Exhibit "C," and attached to that deposition, as shown on that page, is not set forth, nor is it copied into said printed record, as it should have been, but another bond, of like date and tenor, and of same series, and numbered 1999, with coupons or interest warrants thereto, is set forth on pages 12 to 18, inclusive, of said printed record. Now, we agree and consent the bond numbered 1990, and which was attached to said deposition of J. C. Stanton as part thereof, shall be deemed and taken to be part of said printed record, and to be like said bond No. 1999 in all respects, except only in the number thereon appearing.

3. Strike out March 24th, 1879, and insert in lieu thereof March 24th, 1870, on page 22 of said printed record.

4. On page 56 of said record, after the word Exhibit, insert "E" in place of "B" and strike out "B."

5. On page 46 of said record strike out Exhibit "A" and in lieu thereof insert Exhibit "E."

6. Exhibit "E" to the original bill is a copy of the deed executed by the Governor of Alabama, which is testified to by John Swann on page 98 of said record, and testified to by Fred. Wolffe on page 105 of said record.

7. On page 100 of said record where "inches" occurs substitute "miles."

8. On page 135 of said record strike out "ten millions" and substitute "two millions."

9. The duly-certified copy of the deed executed by J. P. McMillen on March 31st, 1870, and duly registered in the office of the register of deeds of Hamilton county, Tennessee, conveying the lands in controversy in this cause to the Alabama and Chattanooga Railroad

Company, which was part of the evidence used on the final hearing and trial of this cause in said circuit court, is not set forth in the printed record of this cause, although it should have been set forth therein as part of the evidence used on the final hearing of said cause in said circuit court. The said duly-certified copy of said deed of McMillen which was so used on said final hearing is hereto attached as Exhibit No. 99 to agreement of counsel, and is to be deemed and taken as part of said printed record and as part of the evidence used on said final hearing. Said deed is the same which is mentioned on pages 57, 59, and 135 of said printed record.

10. On page 89 instead of December 1st, 1878, substitute December 1st, 1870.

Upon the printed record & the foregoing corrections thereof, and our printed briefs, we submit the above-entitled cause for trial on its merits, and request an early decision of the cause.

February 8th, 1886.

SAM'L. F. RICE.
Att'y & Sol'r for Appellants.
ZENOPHON WHEELER,
Att'y & Sol'r for Appellees.

CHATTANOOGA, TENNESSEE.

For and in consideration of nine thousand dollars, three thousand heretofore and six thousand this day to me in hand paid, the receipt of which is hereby acknowledged, and in compliance with a title bond given, dated 25th day of March, 1869, I hereby transfer and convey unto the Alabama and Chattanooga Railroad Company a certain piece or parcel of land lying within the corporate limits of the city of Chattanooga, Hamilton county, Tennessee, bounded as follows, to wit: Beginning at a stake — the S. E. corner of a five-acre lot, known as the Billingsley lot, two hundred & thirty-three & one-third (233⅓ *ft.*) feet from J. B. Weaver's S. E. corner; thence S. 70° E. seven hundred and eighty-seven (787) *ft.*) feet to a stake; thence N. 20° E. nine hundred — thirty-three and one-third (933⅓) feet to a stake; thence N. 70° W. five hundred and sixty-eight and a half (568½) feet to the S. W. corner of the three-acre lot occupied by A. O. Fisher; thence N. 20° E. with the line of said three-acre lot three hundred and ninety-two (392) feet to a stake in the line formerly of J. P. Long, now S. J. Boyce; thence N. 70° W. with said line five hundred and thirty-one (531) feet to a stake, Slayton's, N. E. corner; thence S. 20° W. with Slayton's & Mouds' line three hundred and ninety-two (392) feet to a stake; thence S. 70° E. three hundred and sixteen (316) feet to a stake, the N. E. corner of the aforesaid Billingsley five-acre lot; thence with the line of said lot nine hundred and thirty-three and one-third (933⅓) feet to the beginning, containing, according to survey, about twenty-two acres.

To have and to hold said land unto the said Alabama and Chattanooga Railroad Company and its assigns or successors in office, forever, the title to which I hereby warrant against the lawful claims of all persons whatever.

In testimony whereof I have hereunto set my hand and seal this March 31, 1870.

J. P. McMILLIN. [SEAL.]

Attest:
JOHN M. GILLESPIE.
JAMES N. TRIGG.

STATE OF TENNESSEE, *Hamilton County:*

This day personally appeared before me — clerk of the county court for said county, J. P. McMillin, the bargainer in the foregoing deed of conveyance, with whom I am personally acquainted, and acknowledged that he executed the — for the purposes therein expressed.

Witness my hand, at office, in Chattanooga, this 31st day of March, 1870.

R. H. GUTHRIE, *Clk,*
Pr. J. D. BLACKFORD, *D. C.*

STATE OF TENNESSEE, *Hamilton County:*

REGISTER'S OFFICE, *April 2nd*, 1870.

At 3 o'clock p. m. there was the foregoing deed, with its certificate, received for registration, with nine dollars' — U. S. int. rev. stamps attached & cancelled, and is now of record in book S, pages 542 & 543.

Witness my hand, at office, in Harrison, the day and date last above written.

JOHN F. HAMILL, *Register.*

STATE OF TENNESSEE, *Hamilton County:*

I, H. C. Beck, register of said county, do hereby certify that the foregoing two pages contain a full, true, and correct copy of a deed, together with the certificates of probate and registration thereof, made by J. P. McMillin to the A. & C. R. R. Co., as the same remains of record in my office.

Witness my hand, at office, this 15 August, 1884.

H. C. BECK, *Register.*

[Endorsed:] Supreme Court U. S. Oct'r term, 1885. No. 984. The State of Alabama & *al.*, app'ts, *vs.* T. G. Montague & *al.* Stipulation of counsel correcting and amending record. [Stamped:] Office Supreme Court U. S. Filed Feb. 16, 1886. James H. McKenney, clerk. Exhibit No. 99 to agreement of counsel. Filed Oct. 7, 1884. A. R. Humes, cl'k, by W. G. McAdor, Jr., deputy clerk. Reg. fee, $1.75.

117-602+611

117-602+611

Supreme Court U. S.
FILED.
MAR 31 1886
JAMES H. McKENNEY,
CLERK.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 335.

THE STATE OF ALABAMA, JOHN SWANN, AND JOHN A. BILLUPS, TRUSTEES,
Plaintiffs in Error,

vs.

THEODORE G. MONTAGUE, *et al.*

No. 984.

THE STATE OF ALABAMA, JOHN SWANN, AND JOHN A. BILLUPS, TRUSTEES,
Appellants,

vs.

T. G. MONTAGUE, *et al.*

Motion is made to advance, as well as to submit for decision, the two above entitled causes, upon the printed briefs of the attorneys of the respective parties, the printed record as corrected by agreement of said attorneys on file, and the agreement of the attorneys on file for trial of the cases on their merits.

On March 2d, 1870, the Alabama & Chattanooga Railroad Company executed its mortgage to the State of Ala-

bama to secure an indebtedness arising from a loan at that time to that company of two millions of dollars of the negotiable bonds of the State The *principal* of said mortgage indebtedness was payable in 1899, was evidenced by the negotiable bonds of the company with interest coupons attached, at the rate of eight per cent. per annum, payable semi-annually. The mortgage embraced all the property belonging to the company in Alabama, Tennessee, Georgia and Mississippi, except only so much thereof as had been conveyed by two mortgages executed to other persons by same company in 1868, and recorded in the counties through which the railroad of the company passed. The property in controversy in these two suits was real estate situated in Hamilton County, Tennessee, in which county the mortgage to the State was registered.

The object of each of the above entitled suits. was to enforce the rights and liens which the State of Alabama acquired as to said property in said County of Hamilton, by said registered mortgage of March 2, 1870. To each of said suits, the State of Alabama, as well as its assignees of said mortgage and of all its rights thereunder, were parties.

Suit numbered 335, was ejectment, according to the Statutes of Tennessee, to recover the property in Hamilton County; and was defeated by the decision of the United States Judge presiding on its trial, to the effect. that the title of the plaintiffs shown in the evidence was a mere *equitable* title, and that therefore, the verdict must be for defendants.

Suit numbered 984, was a bill in equity in the same United States Court, to foreclose the same mortgage to the State of Alabama, and to sell said property in Hamilton County to satisfy said mortgage indebtedness; and was defeated by the decision of the United States Judge presiding on its hearing, to the effect, that all relief in that suit was barred

by the Statute of Limitations, (of seven years), and his consequent dismissal of the bill.

The attorneys of the respective parties had the right to presume, that the record sent to this Court by the Clerk of the Court in which these causes were tried, was correct and free from any material omission or mistake. They acted upon that presumption in causing that record to be printed under the direction of the Clerk of this Supreme Court, and in making their first agreement to submit these causes for decision on their merits, before the middle of last December. Acting upon that presumption, they continued to be ignorant of the material omissions and mistakes which are corrected by their agreement of February 8th, 1886, until more than sixty days of the present term of this Court had expired; and after having discovered the said omissions and mistakes, they were unable upon repeated efforts, to agree upon the correction of some of the most material of them, until February 8, 1886, and after the expiration of ninety days from the commencement of the present term of this Court.

The corrections agreed on by said attorneys, on said February 8, 1886, are on file and are printed, and are indicated on the printed record so as to cause that printed record to conform to said agreement of said attorneys of February 8, 1886.

Without the corrections thus agreed on and made, there could not have been a trial upon the merits, in this Court, in the suit numbered 984. And obviously that suit and the suit numbered 335, ought to be tried at the same time.

All the parties are anxious for an authoritative decision of both these suits upon their merits, before the 1st day of May, 1886, the day on which the trust hereinafter noticed will expire.

The assignment by the State of the mortgage and all the rights thereunder was made February 8, 1877, in accord-

ance with the act of the Legislature of Alabama, approved February 23, 1876, commonly called the Debt Settlement Act; which is set forth in the record, and also Pamphlet Acts of Alabama of 1875–'76, pages 130 *et seq.* By that act, (and specially by sections 15 to 19 thereof), a trust was created to be closed upon the expiration of *ten years* from May 1st, 1876; and under that act Swann and Billups became trustees, and the *cestuis que trust*, were the State to the extent of the ten per cent. hereinafter mentioned, and *so many of the holders* of any of said bonds of the State which had been loaned as aforesaid, who might surrender the same to the State or its Governor *within said ten years*. By section 19 of said last mentioned act, the State reserved ten per cent. of the net proceeds of the sale by the trustees of certain lands embraced by the mortgage, to reimburse the State for certain interest paid by it.

By the adverse holding of the property here in controversy by the defendants, at and ever since the commencement of this suit, the trustees have been prevented from selling it, and will be prevented, at the expiration of the ten years fixed for the duration of the trust, from conveying it to the *cestuis que trust*, although they are required so to do by the 19th section of said act of February 23d, 1876. Hence, it is clear, that an authoritative decision of the pending cases, before May 1st, 1886, is essential to prevent injury to the several *cestuis que trust*. Until these cases shall be decided authoritatively, the trustees will remain unable to exercise functions required of them by the last mentioned statute, or to complete or close their said trust; and the *cestuis xue trust*, without any fault on their part, will be exposed to great, if not irreparable injury.

The defendants, if defeated in their defence, will not only lose the mortgaged property, but also the State and county and city taxes thereon, which they must pay whilst they hold and claim the property. An early decision of these

cases against the defendants will deliver them from future payments of such taxes.

As indicated in the recent letter of Mr. Wheeler directed to Mr. Justice MATTHEWS, and now in the control of this Court, these causes would have been submitted within the time mentioned in Rule 20, but for the number and materiality of the omissions and mistakes in the record shown in and corrected by said agreement of February 8th, 1886, the ignorance of said attorneys of said omissions and mistakes herein above mentioned, and the inability of said attorneys, upon repeated efforts, to agree upon the correction of said omissions and mistakes until they made their said agreement of February 8, 1886.

The granting of this motion, under these peculiar circumstances, cannot justly be regarded as a bad precedent, but will prove that this Court so administers its own rules as to avoid irreparable injury and secure speedy justice.

Respectfully submitted,

SAM'L F. RICE,

Attorney for Appellants and Plaintiffs in Error.

March 31st, 1886.

117-602+611

Office Supreme Court U. S.
FILED
MAR 2 1886
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES,

October Term, 1885.

No. 984.

The State of Alabama, John Swann, and John A. Billups, Trustees and Assignees, Appellants,

vs.

T. G. Montague, et als., Appellees.

Brief of Xenophon Wheeler,

Of Counsel for Appellees.

CRANDALL & MORRISON, Printers and Binders, Chattanooga.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1885.

No. 984

THE STATE OF ALABAMA, JOHN SWANN AND JOHN A. BILLUPS, APPELLANTS,

vs.

T. G. MONTAGUE, *et al.*, APPELLEES.

STATEMENT OF THE CASE.

The parties to this suit are the same as those in No. 335 in this Court; the appellants in this cause being the plaintiffs in error in that; the same parties are defendants in both causes; the title to the same land is involved in both; the only difference being, that in No. 335 the plaintiffs in error brought their action of ejectment to obtain possession of the land, and failing in the Court below, they prosecuted their writ of error; while in the present cause, they filed their bill in equity in the Court below, to foreclose a mortgage alleged to embrace the same land, and, their bill being dismissed below, they have brought the case by appeal to this Court.

In both causes the parties are the same; they occupy the same relative position; the land is the same, and the objects of the suit are substantially the same.

THE FACTS ARE:

On the 2nd of March, 1870, the Alabama & Chattanooga R. R. Co. executed a mortgage to the State of Alabama to secure to that State the payment of Two Millions of Dollars of bonds of that company deposited with the State, and for which the State issued and delivered to the company an equal amount of its straight bonds, bearing the same rate of interest, which were to be sold, and the proceeds of sale applied to the construction of the Alabama & Chattanooga R. R. This was done in accordance with an Act of the General Assembly of Alabama, approved Feby. 11, 1870, and the mortgage embraced the lands granted by the United States to the company, "to, and for the benefit of the company, and all the right, title, interest and estate which said company now has, or may hereafter lawfully acquire in and to said lands."

The mortgage also included "the telegraph line and telegraph offices along the line of said road, and belonging to said company; also the machine shops and all other property in the States of Alabama, Georgia, Tennessee and Mississippi belonging to said company; also all coal mines now open or hereafter to be opened and worked by said company; also all iron or other mineral lands; and also all manufacturing establishments now in operation, or hereafter to be constructed." (Record pp. 19, 20.)

It will be observed that, in the mortgage, there are no *covenants of any character*. It is a quit-claim mortgage.

Nor is there any provision relating to subsequent acquired property, except in respect to the lands granted by the United States to the Railroad Company.

Second. Nearly a month after the execution of the mortgage, and on the 31st day of March, 1870, J. P. McMillin executed to the Alabama & Chattanooga R. R. Co. a deed to the land which complainants allege was included in the mortgage, and which deed contained the following recital:

"For and in consideration of nine thousand dollars, three thousand heretofore, and six thousand this day to me in hand

paid, the receipt of which is hereby acknowledged, and in compliance with a title bond given, dated 25th day of March, 1869, I hereby transfer and convey unto the Alabama & Chattanooga Railroad Company a certain piece or parcel of land." Describing the land in controversy.

The above recital in the deed is the only evidence of the execution of the title bond. No title bond was ever registered; none has ever been produced; no witness has been produced who ever saw it, and it is conclusively established that none was ever executed. [See Deposition J. C. Stanton, Record pp. 87, 90, 91.]

Third. On the 25th Feby., 1871, John C. Stanton professing to act as the attorney in fact of the Alabama & Chattanooga R. R. Co., by deed containing covenants of seizin and warranty, conveyed the land to Thomas Webster, and on the 2nd March following, the Alabama & Chattanooga R R. Co., executed to John C. Stanton, a power of attorney constituting him its attorney in fact to sell and convey the land, using therein the words, "Hereby ratifying and confirming any sale or disposition said agent or attorney may make, or may have made in the premises." (Record, pp. 62, 63, 64.)

Fourth. On the 8th April, 1871, Thomas Webster conveyed the land to Isaac H. Tower, Theodore G. Montague, Xenophon Wheeler, Geo. M. Sherwood, Francis Woodbury and Louis Aufucht. (Record, pp. 65, 66.)

Fifth. The purchasers immediately went into possession of the land, laid out streets through it, with blocks and lots, and sold a number of the lots to parties who at once took possession of same, and most of whom erected houses, soon after they purchased, which houses have been continuously occupied from the year 1872 and 1873 to the present time. Upon a portion not sold the purchasers erected a small house, still standing upon the premises, used to protect a large spring upon the property, and used as a stable and tool-house most of the time since 1871. They bought back in 1874 one of the lots they had sold upon which a house had been erected, and have held it by tenants ever since. For some years brick-making was extensively carried

on upon the premises not sold; and the defendants, the original purchasers, had paid taxes upon the property since 1871, the amount up to 1884 being $2,133.00. [Deposition of Jesse Blanton and T. G. Montague. Record, pages 125 to 134 inclusive.

Sixth. In pursuance of an Act of the General Assembly of Alabama approved Feby., 23, 1876, the Govenor of Alabama on the 8th Feby., 1877, executed to complainants, John Swann and John A. Billups, a quit-claim deed, conveying to them "all the right, title and interest" acquired by the State of Alabama in the lands and property described in the mortgage of 2nd March, 1870. (Record, pp. 38, 39, 40, 41.)

Seventh. On the 28 May, 1883, complainants filed their bill in the Chancery Court at Chattanooga, making among other defendants, the parties in possession of said tract, viz: the original purchasers from Webster, and the owners of lots bought from the original purchasers, praying among other things, that the mortgage of 2nd March, 1870, might be foreclosed, and "that all the respondents who occupy any of said lands be ejected therefrom; that complainants Swann and Billups be placed in possession of all the said twenty-two acres of land, etc."

The defendants in possession demurred to the bill, when complainants, without waiting for the Court to pass upon the demurrer, filed an amended bill, whereupon the defendants removed the cause to the Federal Court under the Act of 1875.

In the latter court the demurrer of the defendants was overruled, leave being granted them to rely upon the causes of demurrer in the answer, whereupon all the original purchasers from Webster living, with the representative of one who was dead, and most of the owners of lots purchased from the vendees of Webster, answered.

Eighth. On the 9th October, 1884, before the Judges of both the Circuit and District Courts, upon the pleadings and evidence, without passing upon the other question involved in the cause, the Court, both Judges concurring, was of the opinion that the Statute of Limitation was a bar to the relief sought by complainants, and dismissed their bill, from which judgment of the Court, the complainants have appealed to this Court. (Record, p. 3.)

ARGUMENT.

To me there appears in the record other and better grounds for the action of the Court below in dismissing the bill of complaint, than that of the Statute of Limitations, and if the Court should be of the opinion upon all the facts in the case, that the action of the Court below in dismissing the bill, was correct, though the reason given for the action was an erroneous one, this Court will not reverse the Court below. [Deery *vs.* Cray 5 Wall., 807. Brobst *vs.* Block 10 Wall., 519. Decatur Bank *vs.* St. Louis Bank 21 Wall., 294. Phillips, etc. *vs.* Seymour 91 U. S. 653.]

I

The defendants insist, that *the land sued for is not embraced in the mortgage.*

This constituted one of the grounds of demurrer to the bill, and being overruled, leave was granted to rely upon the grounds of demurrer in the answer which was done.

"The description of the property upon which the mortgage is an encumbrance must be such as reasonably to enable subsequent purchasers to identify the land; otherwise the record of the mortgage is not notice of any encumbrance upon it." [Jones on Mortgages, § 528.]

It is not insisted that the description of land in a deed or mortgage must be specific. On the contrary there is abundance of authority to the effect that general words of description are frequently sufficient, upon the familiar principle, "that is certain which is able to be made certain."

If, however, the description in the mortgage which is claimed to embrace the land in controversy is examined, it will be seen, not only that there is no specific description, but there is nothing

that will enable a subsequent purchaser to identify this land as forming any part of the property intended to be included in the mortgage.

It will be remembered that the conveyance from McMillin to the mortgagor was subsequent to the mortgage, and was subsequently registered. The "subsequent purchaser" in examining the title of the proposed purchase, would find no record of McMillin having parted with any interest ~~of~~ in the land until March 31st, 1870, for the bond named in that deed was not registered. His researches would therefore be naturally directed to the title of the grantee *after* it acquired the title.

But if he was sufficiently astute to look backward and examine if the grantee, had conveyed the property before he became the owner, he would find that before the execution of the deed to the grantee, but after the date of the execution of the bond recited in the deed the grantee had executed a quit-claim mortgage, in which among the property mortgaged, he would have found no description of the land the title to which he was examining, but that there was included "all other property in the State of Alabama Georgia, Tennessee and Mississippi belonging to said company." If these words had attracted his attention, and he had been in doubt, if these words of description might not include the land he proposed purchasing, he would examine carefully the descriptive words immediately preceding and succeeding the general words above named, and he would have found that the words "all other property" occur with words limiting their application, words descriptive of personal property and chattels real. The mortgage included not only the lands in the State of Alabama granted by Congress to the mortgagor, but embraced also "the telegraph line and telegraph offices along the line of said road and belonging to said company; also the machine shops, and all other property in the States of Alabama, Georgia, Tennessee and Mississippi belonging to said company; also all coal mines now open or hereafter to be opened and worked by said company; and also *all iron or other mineral lands*; all iron manufacturing establishments now in operation or hereafter to be constructed."

The "subsequent purchaser" would, if he remembered the legal maxim "*noscitur a sociis*," conclude that the general words "all other property" were restricted by the words preceding them, and that the words were descriptive of "all other property" of the nature of telegraph lines, telegraph offices and machine shops.

And in reaching this conclusion he would have experienced no difficulty in finding abundance of authority.

"It is a rule of legal construction that general words following an enumeration of particulars, are to have their generality limited by reference to the preceding particular enumeration, and to be construed as including only all other articles of like nature and quality." Rapalje & Lawrence Law Dictionary, Vol. 1, 435.

In Chidsey vs. Canton, 17 Conn. 479, the Court in construing a statute which provided that "if any horse, or other beast, or cart, carriage, or *other property* shall receive any injury or damage, through or by means of any defective road or bridge," by the words "or other property," must be understood property of the kind enumerated in connection with those words; and where in another section it is provided that "if any person or property shall suffer any damage by reason of any defect in such railing," &c., the Court held that while there was not in this ~~claim~~ clause, as in the preceding, "any words used in connection with the word property, calculated to limit its operation to any particular species," yet that word "immediately follows one in which the operation of the term is limited and must be considered as having the same construction."

Harwood vs. City of Lowell, 4 Cush. 313, was a case arising under a statute which provided "a remedy for any person who shall lose a limb, break a bone, or receive any other injury in his person, or in his horse, team or *other property*, through any defect," &c.

The Court held, Chief Justice Shaw delivering the opinion, "that the remedy was confined to loss or damage done to visible or tangible property, such as animals, goods or chattels."

* * * * "There is a good rule of construction, *noscitur a sociis*, ~~when~~ where several particulars are enumerated followed by a

word more general, the provision is thus limited to things of like kind." Therefore, though the word "property' is used, it follows words designating goods and chattels, and could not extend to mere rights."

The case of the People vs. N. Y. and Manhattan Beach R'y Co., 84 N. Y. 565, was almost precisely such a case as the one at bar, in this respect.

It was an action to recover real property, under an Act, authorizing actions to be brought by the people of the State to recover "money, funds, credits and *property*" held by public corporations, boards, officers and agents, for public purposes, which had been wrongfully converted or disposed of." The Court in its opinion says:

"It is to be observed that the word *property* follows the enumeration of specific kinds of personal property." The words are "money, funds, credits and property." * * * * * "The word property, associated as it is with the preceding words of specific description, is to be construed as referring to property of the same general kind with that previously enumerated upon the maxim *noscitur a sociis*. [See also, "Matter of Hermance *et al.*" 71, N. Y. 487, where same proposition is laid down and authorities cited. Corning *vs.* Comstock 1, Comstock 69; Clark *vs.* Gaskarth, 8 Taunt., 431; Bishop on Written Laws, § 245]

It, after examining the words descriptive of property preceding the words "All other property," he still entertained a doubt, if those general words might not include the land he proposed purchasing, an examination of the words descriptive of property, immediately following the general words, would relieve his doubts. He would find there was included in the mortgage "Also *all coal mines* now open or hereafter to be opened and worked belonging to said company, and *all iron* or *other mineral lands*, and *all iron manufacturing establishments*, now in operation or hereafter to be constructed."

He would naturally reason, that if the draughtsman of the mortgage had intended to include this land—in which the mortgagor, at the best, had only an equitable interest, and that interest was unknown to the world, since there was no record of

the title bond—he assuredly would not, after the words "All other property in the States of Alabama, Georgia, Tennessee and Mississippi, belonging to said Company, have added," "*All coal mines*," "*All iron* or *other mineral lands*," "*All iron manufacturing establishments.*"

If the last named property of the same kind as this land, was included in the words "All other property," why proceed in the same connection to enumerate real estate?

"*Expressio unius est, exclusio alterius.*"

The fact that the draughtsman, immediately after the words "All other property," describes specific real estate, shows conclusively, that those words were not designed to embrace real estate, but, rather property of the same kind as that previously enumerated."

The deed of McMillin to the R. R. Company conveying the land had not been executed when the Act of Feby 11, 1870, became a law, or when the mortgage of March 2, 1870 was executed. It is certain that the agents of the mortgagee did not so much as know of the existence of the land in controversy.

That the words "All other property" were not designed to include real estate is shown also by the statements of J. C. Stanton, whose deposition was taken by complainants.

Mr. Stanton, the Supt. of the Alabama & Chattanooga R. R., (Record p. 88) testifies that he dictated the bill which became the Act of Feby 11, 1870; and being asked what the words "All other property" used in the Act and copied into the mortgage referred to, his answer is, (Record p. 89).

"The railroad company had opened a coal mine; they had "personal property connected with that mine, such as tracks, cars, "mules, tenement houses and tools.

"It was intended to cover that as well as the lands and tele- "graph poles and instruments."

And being further interrogated respecting the equipment of the coal mine, he answered (Record p. 90):

"I did talk with ex-Governor Smith, the then governor of Alabama, in regard to this coal mine and the property attached. I took him to the coal mine once or twice for the purpose of having him examine it. This was before the bill passed. I went before the Committee of the Senate and House representing the bill as it was drawn."

"I told them about this coal mine, and represented the advantages it would be to the State; also that it had cost a large sum of money to open it and equip it."

"When the bill was drawn, I intended to have it cover that property or any other improvements which might be put upon these lands which were called government lands, donated by the State to the Company. I should say the mine and equipments cost about one hundred and seventy to seventy-five thousand dollars."

This testimony of Mr. Stanton is competent, as showing the intent of the parties.

"In ascertaining the subject conveyed, the intent governs as in other cases of contract, and the deed must receive the same interpretation which it would have received by the parties themselves immediately after its execution." Herman on Mortgages 470.

"And when any doubt exists upon the true sense and meaning of the words themselves, or any difficulty as to their application, under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself." Herman on Mortgages 439.]

"And when there is *latent* ambiguity in the deed or mortgage, this ambiguity may be explained by parole testimony." Herman on Mortgages 442, 443 and 454.

"A reference to 'surrounding circumstances' is allowed for the purpose of ascertaining the subject matter of a contract, but not to add a distinct undertaking." Maryland vs. Railroad Co. 22 Wall., 105. United States vs. Peck, 102 U. S., 64.

"In case of ambiguity, Courts look to language employed, subject matter and surrounding circumstances, and may put

themselves in situation of the parties to aid in construction." Nash vs. Towne, 5 Wall., 689. United States vs. Gibbons, 109 U. S., 200. Merriam vs. United States, 107 U. S., 437.

Contracts are always to be construed with a view to real intent of parties. Hollingsworth vs. Fay, 4 Wall., 345. United States vs. Gurney, 4 Cranch, 333.

An examination of the authorities cited by counsel for appellants upon this point will show how entirely they fail to sustain his position.

In the case of McGavock vs. Deery, 1 Cold, 265, the syllabus gives the point decided in the case and is in these words:

"A deed of trust, which conveys all the interest of the assignor in the real estate of his deceased father, is not so vague and uncertain, as to render the assignment void."

Certainly, no one would now doubt that.

In the case of Siegfried vs Peoples' Bank, 2 Tenn. Ch. R. 17, it was held that a deed of assignment for the benefit of creditors which conveyed "all the lands, tenements, etc., of every nature and description" belonging to the grantor; was sufficient to pass all the grantor's realty.

Sheets vs. Selden's Lessee, 2 Wall., 177, was the case of a conveyance made of a division or branch of a canal, "including its banks, margins, tow-paths, side-cuts, feeders, basins, right of way, dams, water-power, structures, *and all the appurtenances thereunto belonging*," the Court held, that with "all the appurtenances thereunto belonging," passed certain parcels of land adjoining the canal, and belonging to the grantor, which were *necessary to the use* of the canal and water-power, and *were used with it at the time.*

The conveyance in the case of Spindle *vs.* Shreve, 111 U. S., 542, differed widely in its phraseology from the case at bar. The deed of trust in that case conveyed "all the real, personal and mixed property owned by said party of the second part, not exempt from execution and which is as follows:"—specifically describing certain lots, parcels of lands and personal property, and directing the trustee how to dispose of the property—and then directs the trustee "to sell and have sold all the foregoing property, and *any and all other property*, not exempt from execution, which by *any oversight may have been omitted in the foregoing list, etc.* * * * * * "it being the object and intent of

this conveyance to said second party, to convey all the property belonging to said first party not exempt from execution for the benefit of all the creditors of the first party."

Comment on the case is surely unnecessary.

The cases of Frey vs. Clifford, 44 Cal. 343; Lessee of Barton vs. The heirs of Morris, 15 Ohio, 408, and Hoxie vs. Lawrence, 117 Mass., 111, cited by appellants' counsel, I have not the means of examining, but if similar to those I have examined, they will fail to sustain his position.

The case of Wilson *vs.* Boyce, 92 U. S., 320, cited by appellants counsel, is more nearly an authority for appellants upon this point than any I have been able to find.

But that case in its facts differs widely from the present case.

In that case it was held that in a statutory mortgage, which declared that certain bonds should "constitute a first lien and mortgage upon the *road and property* of a railroad company, the word property included all the lands of the company.

But in Wilson *vs.* Boyce, the mortgagor was the *owner* of the property, and its ownership was known to the world when the statutory mortgage took effect, and that knowledge may be presumed to have influenced the action of parties becoming the purchasers of its bonds. In the present case, the mortgagor was not the *owner* of the land at the execution of the mortgage; at most owned but a mere equity in it, having paid one-third of the purchase money, and such interest as it had, was unknown to the world, was unknown to the mortgagee and its agents, and could not have influenced the action of the mortgagee in taking the mortgage.

In Wilson *vs.* Boyce, the statutory mortgage contained no words of limitation; the act constituting the mortgage reciting that the bonds should "constitute a first lien and mortgage upon the road and property" of the company; while in the present case the words "all other property" follow words descriptive of personal property, and chattels real, and are limited by them, and are followed by words descriptive of property of the same class, as that to which the property in controversy belongs.

In one case it was clearly the *intent* to include the land in controversy; in the other it was clearly *not* the intent to include.

II.

In *point* of *fact no bond was ever executed.*

The only evidence of the bond is found in the recital of the deed from McMillin to the Alabama & Chattanooga R. R. Co.

But that it never had an actual existence is shown.

First. If one had been executed, it would in all probability have been registered, since the consideration of the sale was the sum of $9,000.00; but no such bond was ever registered, the original or a copy has never been produced, nor any witness who has ever seen the original or a copy.

Second. The phraseology of the McMillin deed is peculiar, in that it does not state the obligee of the bond, as it would likely have done, had the Alabama & Chattanooga R. R. Co. been the obligee in the bond as well as the vendee in the deed.

This is the more significant from the fact, that in Tennessee bonds for title are transferable by delivery merely, and are frequently assigned and the deed made to the assignee.

Third. J. C. Stanton is the only party living who has any personal knowledge of the purchase from McMillin, the latter being dead.

He is a witness for appellants, but testifies that, to his best recollection no bond ever was given, but a receipt was given for the money paid, and nothing more, as at the time it was expected that another Railroad Company would be a joint purchaser of the land. See Record pp. 87, 91.

III.

If the words in the mortgage "All other property in the States of Alabama, Georgia, Tennessee and Mississippi belonging to said Company," are sufficiently descriptive of the land in

controversy, and the mortgagor had any mortgageable interest in it, the mortgagee acquired by the mortgage, the interest the mortgagor possessed at the execution of the mortgage, and no more; and, as the mortgage contained no covenants of title, the title subsequently acquired by the mortgagor, through the deed of McMillin, did not inure to the benefit of the mortgagee.

It seems a work of supererogation to cite authorities to the effect that an *after acquired* title does not pass to the vendee or mortgagee unless there is a covenant of warranty in the deed or mortgage, or its equivalent.

A very few, only, of a multitude of authorities will be cited.

In the case of Jackson vs. Wright, 14 Johns 192, the Court uses this language:

"The deed from Boise to McCracken is a bargain and sale and quit-claim, and he had then no title to convey in the premises; and no title, not then *in esse* would pass unless there was a warranty in the deed; in which last case it would operate as an estoppel for avoiding circuity of action." Citing authorities.

"One in possession of lands under a contract of purchase, has a mortgageable interest."

"If he makes a mortgage with *covenants of warranty*, and afterwards acquires the legal title to the property, he is estopped to deny that he had no title at the time of the mortgage." Jones on Mortgages, §§ 679, 561, 682, 825.

"But at the present time, especially when a mortgage is merely a lien and not a title, this estoppel must be regarded as arising only from a covenant for title express or implied. In the absence of such a covenant, the mortgagor may therefore show what his interest in the mortgaged lands was at the time of the delivery of the mortgage, and may show that a subsequently acquired title does not enure to the benefit of the mortgagee. A wife joining her husband in a deed to his land, but not making any covenants, is not estopped to claim title to the land under a mortgage held by her." Jones on Mortgages, § 1483. Rawle on Covenants, 390.

"A., having only an equitable title, conveyed lands by bargain and sale *without warranty*, to B. in trust for C., and afterwards acquired the legal title and sold it to D. with warranty.

It was held that the legal estate subsequently acquired by A. did not enure to B. in trust for C." Dosewell vs. Buchanan, 3 Leigh. 365.

"So when a person has a vested *share* under an executory devise, and makes a conveyance of *all right*, and subsequently the whole estate vests, the estate subsequently vesting does not pass by estoppel." Hall vs Chaffer, 14 N. H. R. 216.

"And if the deed conveys all the right, title and interest of the grantor, instead of an absolute estate, the grantor will not be estopped from setting up an after acquired title since he did not undertake to convey any greater interest, or better title, than he then had." Tiedman on Real Property, § 728.

In Comstock vs. Smith, 13 Pick. 116, it was held that

"A covenant in a deed of land that the grantor will warrant the land against all persons claiming under him does not estop him from setting up a title subsequently acquired by purchase or otherwise."

In Doane vs. Wilcutt 5, Gray 328, It was held that

"An indenture between tenants in common, which recites their seizin in fee of certain lands, and assigns a portion thereof to each to hold in severalty, and contains mutual covenants for the quiet enjoyment by each of the portion so assigned to him does not estop. one of the parties to set up an after acquired title to land so assigned to one of the others." See also Miller vs. Ewing, 6 Cush. 34. Wight vs. Shaw, 5 Cush. 64. Flagg vs. Mann, 14 Pick. 467. Blanchard vs. Brooks, 12 Pick. 66. Dart vs. Dart, 7 Conn. 250. Washburn on Real Property, Vol. 3 106-7.

The authorities are a unit that only such interest as the grantor or mortgagor had at the date of the execution of the deed or mortgage passes, where there are no covenants for title, and therefore, in the present case, if the Alabama & Chattanooga R. R. Co. had no title to the land in controversy at the date of the

mortgage, 2 March, 1870, the land did not pass by the mortgage, and, if it had *any* title, at the date of the mortgage, only such title as it *then* had passed, and the mortgagor and its privies in estate are not estoppel from setting up the after acquired title derived from the conveyance of McMillin of 31 March, 1870.

The proposition enunciated in the brief of appellants' counsel that this subsequent conveyance "converted the equitable title of the company into a legal title, which at once, by operation of law, enured to the benefit of the mortgagee," is not sustained by a solitary one of the authorities cited by the learned counsel of appellants to sustain it, unless by the Bank of Greensboro vs. Clapp, N. C. R. 487, and Cram vs. Turner, 7 Hun. (N. Y.) 857, which reports are not accessible to me.

An examination of the other authorities cited produces a feeling of profound astonishment, that they chould be supposed to sustain the proposition

In the case of Daly vs. Willis, 5 Lea 104, the trust deed contained covenants of seizin and warranty, and the point decided was that when a wife joins with her husband in the operative words of a deed, the deed passes the homestead and dower estate of the wife without specifically naming them.

Bush vs. Marshall, 6 Howard 284, 289, is an authority for appellees.

The deed contained covenants of seizin and warranty and the syllabus contains the real point decided, and is in these words: "If one who has conveyed with warranty, afterwards acquires the true title, it enures by way of estoppel to his grantee." The converse is here plainly implied, that if one who conveys *without* warranty, afterwards acquires the true title, it does *not* enure by way of estoppel to his grantee.

Threadgill vs. Pintard 12 Howard 24, 38, Cook vs. Lunsford, 2 Lea 237 and Henshaw vs. Wells, 9 Humphrey 568 decide nothing bearing directly or indirectly upon the point under discussion, as an examination will disclose.

The case of Skidmore *vs.* Pittsburgh, Cincinnati & St. Louis

Ry. Co., 112 U. S., 33, is no authority for the proposition of appellants counsel.

In that case a Railroad Co. acquired an equitable interest in lands for railroad purposes, went into possession, and subsequently leased its line, including the land in question, to another Railroad Co., who took possession of the land, built a depot and machine shops upon it, and held it for years. While the lessee was thus in possession, the lessor acquired the legal title, and the point decided in the case is expressed in the syllabus, that "the legal title to real estate acquired subsequent to the lease, by a lessor owning the equitable title, at the date of the lease, inures to the benefit of the lessee, as against a judgment creditor of the lessor whose judgment is subsequent to the lease."

In Van Rensselaer *vs.* Kearney, 11 Howard, 323, the deed described the lands conveyed by metes and bounds and showed on its face that the grantor expected to convey and the grantee to receive a deed *equivalent* to one containing covenants of title. The case turned upon a covenant against encumbrances recited in the deed, the grantor having for himself and heirs, covenanted and agreed with the grantee, his heirs and assigns, that the tract conveyed (with certain exceptions named) was "free and clear, and should be held and enjoyed by the grantee, his heirs and assigns, according to the true intent and meaning of these presents." The Court upon this point said, "There is much force, therefore, in the argument that this covenant, from its peculiar phraseology and structure, was intended as something more than a simple covenant against encumbrances and charges upon the Estate; and that it was intended by the parties, as a covenant of the title which the deed purported to convey, and if so, this of itself would operate upon the estate subsequently acquired by the grantor."

The court held that "if the deed bore on its face evidence that the grantor intended to convey, and the grantee expected to become invested with an estate of a *particular description*, or quality, and that the bargain had proceeded *upon that footing*, between the parties, then, although it may not contain any covenants of title, in the *technical* sense of the term, still the legal operation and effect of the instrument will be as binding upon

the grantor and those claiming under him, in *respect to the estate thus described*, as if a formal covenant to that effect had been inserted, at least so far as to estop them from ever afterwards denying that he was seized of the *particular estate* at the time of the conveyance."

What "particular estate" or what estate at all, did the Alabama & Chattanooga R. R. Co. represent that it was seized of, in the land in controversy, in the mortgage of March 2, 1870? It did not claim to be the owner of the land, much less claim to be "invested with an estate of a particular description or quality; "nor did it so much as mention the land in the mortgage.

The Court, after citing numerous authorities, says, "the principle deducible from these authorities seems to be, that whatever may be the form or nature of the conveyance used to pass real property, if the grantor *sets forth upon the face of the instrument*, by way of recital or averment, that *he is seized of a particular estate*, in the premises, and which estate the *deed purports to convey*; or, what is the same thing, if the *seizin* or *possession* of a *particular estate is affirmed in the deed*, either in express terms, or by necessary implication, the grantor and all persons in privity with him, shall be estopped from ever afterwards denying that he was so seized and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after acquired title as between parties and privies."

How this language can be tortured into an authority for the proposition in the case at bar, that the after acquired title enured to the benefit of the grantee in the mortgage, when the land is not named or described in the mortgage, and no representations of any character are made respecting it, or any of the other property embraced in the mortgage passes my comprehension. The doctrine of estoppel is invoked in behalf of the appellants. But in the mortgage, no claim is made that the mortgagor owns the land or any interest in it. There is nothing upon which an estoppel can take effect. The mortgagor has said nothing that it, or its privies in estate, have since attempted to deny.

To return to my original proposition. All other questions

aside, the State of Alabama at no time acquired anything more that the equitable interest in the lands owned by the Alabama & Chattanooga R. R. Co., at the date of the execution of the mortgage, which interest would be represented by the proportion of the purchase money paid before the execution of the mortgage, to that paid after the execution, that is, an undivided one-third interest.

In no possible aspect of the case, did the mortgagee acquire more than this interest.

The title ordered to be sold is ordinarily only what the mortgagor possessed at the date of the mortgage, and a title subsequently acquired will not be subject to sale, unless the mortgage contains covenants of warranty. Jones on Mortgages, §§ 1656, 1581, 1483. Smith vs, DeRussy, 29 N. J. Eq. 407.

IV.

But in any conceivable aspect of the case the complainants cannot *now* have a decree of foreclosure, if every other question in the case was resolved in their favor.

The mortgage of 2nd March, 1870, included a large amount of other property, the value of which is unknown.

Leaving out of sight. the telegraph line and offices, coal mines, machine shops, iron manufacturing establishments, included in the mortgage, respecting the value of which, there is no testimony in the record, the lands alone, granted by the United States to the Alabama & Chattanooga R. R. Co., and included in the mortgage, must be of immense value.

From the testimony of Mr. Swann himself, (Record, p. 100,) it would appear that the trustees have recently received from the Departmeni of the Interior 70,000 acres; that they now have undisposed of, between 450,000 and 500,000 acres, and since the appointment of himself and Mr. Billups as trustees, in 1877, they have disposed of 130,000 acres. This does not include

lands sold by the mortgagor, under the power of sale reserved in the mortgage.

It would seem also that the trustees claim much more land, for being asked (Record, p. 101,) if the trustees had received all the lands to which they were intitled, he answered: "I could not say that, because if we could get all that we are entitled to, our mileage would entitle us to eight or nine hundred thousand acres. The best I can say is, that we have obtained everything that was obtainable, and selected everything that was open to selection, and applied for a great deal more than we got."

And being asked if he expected to obtain any more land from the Department of the Interior, his answer is: "Not with anything like confidence or in any substantial quantity."

The amount that has been realized by the trustees from the mortgaged property has been large. By Section 19, of the Act of 1876, by virtue of the provisions of which Swann and Billups became trustees (Record, p. 36,) it is provided that the trustees shall pay into the treasury of Alabama, "ten per cent. of the net proceeds of the sales of all said lands so made by them, having first deducted the reasonable expenses incurred in executing the trust," until a certain amount of interest paid by the State upon the two millions of straight bonds heretofore named had been refunded, and Mr. Swann tells us (Record, p. 101,) that he had paid the State from the proceeds of the trust, $40,000.00. This would be ten per cent. upon $400,000.00 of sales, outside the "reasonable expenses incurred," and Mr. Swann, in the same connection, informs us, that this $40,000.00 is all the State claims, so far as he knows, and it is very likely the aggregate of sales much exceeds $400,000.00, and there remains undisposed of between 450,000 and 500,000 acres, and more land applied for.

Whether the value of the lands and other property, outside the land involved in this suit, proves sufficient to pay the mortgage debt or not—and there is no testimony upon this point—the defendants as the grantees, of Webster, the vendee of the mortgagor, have the right to require the complainants to first exhaust the other property embraced in the mortgage, and look

to the land which they have purchased, only in case the sale of the balance of the mortgaged property, proves insufficient to pay the mortgage debt.

It is a familiar principle of equity that when one creditor has two securities, and another creditor but one of the two, equity requires the first creditor to exhaust the security upon which the second has no lien, and only resort to the second security in case the first is insufficient to pay his debt, and then only for the deficit.

The grantee of the mortgagor can always compel the mortgagee to first sell the unsold mortgaged property, and only look to that portion of the mortgaged property conveyed to him, in case said unsold portion produces a fund insufficient to discharge the mortgage debt.

V.

The Act of the General Assembly of the State of Alabama, approved Feby. 23, 1876, and the deed of the Governor of the State, executed in pursuance of said Act, conveying to Swann and Billups all the interest of the State in the mortgaged property, is invalid and void, as against the mortgagor, and those claiming under the mortgagor, because they impair the obligation of the contracts.

An examination of the act of Feby. 23, 1876 will disclose some extraordinary provisions.

The State, under the Act of Feby. 11, 1870, issued its own bonds, and gave to the Railroad Co., taking as an indemnity to secure itself against loss, an equal number of the bonds of the R. R. Co. of the same denomination and bearing the same rate of interest.

As will be seen by section 15 of the Act of Feby. 23, 1876, the State repudiates its own bonds, but agrees to surrender to

their owners, all its right in the property embraced in the mortgage given by the R. R. Co. to secure the payment of the indemnity bonds, but only such of the holders of its own, or straight bonds as will surrender their bonds shall have any of the benefits of the substitution. Section 19 Record, p 36.

Those who prefer to retain their bonds, rather than accept a doubtful and imperfect security, shall have none of the benefits of the mortgaged property; but the proceeds of the sale of the mortgaged property—with the exception of some reservatians mentioned hereafter—however large the amount may be, shall be divided among those who surrender their bonds, however few may be the number of bonds surrendered.

Unless they take what the State chooses to give, the holders of its bonds get nothing.

But this, however dishonorable and discreditable it may be, does not effect the rights of the defendants.

But of the other provisions of the Act defendants have a right to complain.

First. The mortgagor and privies in estate with it have the right to insist that *all* the mortgaged property shall be sold under regular foreclosure proceedings by order of Court at public sale.

These defendants, upon the theory of the complainants, are holding a part of the mortgaged property, having purchased for a valuable consideration. They have the right to insist, not only that the balance of the mortgaged property shall be first sold, but that it shall be sold at public sale, as contemplated in the mortgage, that it may produce the largest sum possible, thus perhaps, avoiding the necessity of a sale of that portion of the mortgaged property purchased by them.

The right of public sale under the order of the Court is taken away in Sect. 19, of the Act of Feby. 23, 1876, and the trustees appointed under that section are empowered to make sale of hundreds of thousands of acres of land, and other property embraced in the mortgage, at such prices and upon such terms as may seem meet to them.

If they choose to sell any of the property to their friends, at greatly less than its real value, there is nothing to restrain them from so doing, and thus sacrifice the interests of the assignees of the mortgagor. They may reject a fair price offered by a stranger, and accept a much less price offered by one of their own friends.

The sale at public outcry, to the highest bidder, contemplated by the mortgage, is taken away, and secret sales, with all the opportunities for fraud and collusion, attendant upon such sales, substituted therefor. Such are the extraordinary powers vested in the trustees, yet they are required to give no bond to account for the moneys coming to their hands arising from sales of mortgaged property, nor for the faithful performance of their duties as trustees, nor are they obliged to account to any tribunal for the moneys they receive.

Should they sell the mortgaged property upon which defendants have no direct claim, for a sum more than sufficient to discharge the mortgage indebtedness, and thus lift the lien upon that portion claimed by defendants, the latter have no means of knowing it, for no reports are exacted of the trustees.

In all this the contract of the mortgage is impaired.

The mortgagee is in a limited sense, at least, a trustee of the mortgagor. McMurry vs. Barfield, 10 Heisk. 532. Storys Eq. Juris § 1013 Note 3. Storys Eq. Juris § 1016. Marky et al vs. Langley et al, 92 U. S. 155. 1 Peters 441.

Second. The mortgagor, and his privies in estate, have the right to insist, that the proceeds of the sale of the mortgage property shall not be directed to objects and purposes not contemplated by the mortgage, but shall be applied strictly to defraying the cost of foreclosure and payment of the mortgage indebtedness. Andrews vs. Torrey 1 McCarter N. J. Eq. R. 355. Atwater vs. Underhill, 7 C. E. Green N. J. Eq. R. 599. Phillips vs. Thompson, 2 John Chan. R. 423.

But the Act of Feby. 23rd, § 19, provides for the appointment of trustees, parties unknown to the mortgage; provides

for a commission to be allowed them upon the proceeds of their collections and sales; provides for the payment of the reasonable expenses of the trustees incurred in executing the trust; and also provides, that the trustees shall pay into the treasury of the State ten per cent. of the net proceeds of the sales, until the whole amount of interest paid by the State upon its straight bonds has been reinbursed to her.

The amount so paid the State, Mr. Swann fixes at $40,000.00. And this is done although the Act of 1870 shows that the State was to pay the interest upon its own bonds out of the interest paid by the R. R. Co. on its bonds, deposited with the State as an indemnity. [Sec. 1, Act 1870.]

And the Original bill shows that the R. R. Co. had paid the interest upon the indemnity bonds, up to the passage of the Act of Feby. 22, 1876, (Record, p. 5,) where it is stated that the R. R. Co. had "not paid any interest thereon since January, 1876, and that all the principal of said bonds, and the coupons for interest falling due since January, 1876, is wholly unpaid," and all coupons prior to that of June 1, 1876, appear to have been paid, as will be seen by an examination of the bond and its coupons made an exhibit to the bill.

According to the showing of complainants themselves, there had been no default in the payment of the interest upon the bonds of the R. R. Co. at the date of the passage of the Act of Feby. 23, 1876, and the principal of the bonds did not become due until 1899.

The defendants insist that the disposition of the mortgage property and its proceeds, provided for in the Act of Feby. 23, 1876, onerated the property with burdens, unjustly and illegally imposed, is an unauthorized and fraudulent misappropriation of the mortgage property and its proceeds, and is in violation of the contract of the mortgage.

The bondholders are not before the Court asking relief, and the trust, the complainants, Swann and Billups are seeking to enforce, cannot be granted without sustaining the validity of the Act of Feby, 23, 1876, and the deed made by the Govenor in pursuance

thereof. The Court is not asked to grant, and cannot grant any relief, except, either, to turn the property over to Swann and Billups to be by them sold, and the proceeds disposed of as provided by the Statute and conveyance, or sell the property and turn the proceeds over to them for them to so distribute.

Swann and Billups have no right to apply the fund differently from the manner designated in the deed from the State to them; and the State has no right to dispose of the property or its proceeds in any manner differently from that pointed out in the mortgage.

Moreover, it is clear from an inspection of the deed from the Governor to Swann and Billups, made in pursuance of the Act of Feby. 23, 1876, that the State has parted with all its "right, title and interest" in the mortgage property, and cannot be legally made a complainant to the bill.

XENOPHON WHEELER,

Of Counsel for Appellees.